80-5950

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

NO. ___

LAVERNE L. LOGAN, Appellant,

v.

ZIMMERMAN BRUSH COMPANY, Appellee.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The appellant, Laverne L. Logan, asks leave to file the attached Jurisdictional Statement without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The appellant's affidavit in support of this motion is attached hereto.

Gary H. Palm
Counsel for Appellant

Gary H. Palm
Mark C. Weber
Counsel for Appellant
Edwin F. Mandel Legal Aid Clinic
University of Chicago Law School
6020 South University Avenue
Chicago, Illinois 60637
(312) 324-5181

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AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, Laverne L. Logan, being first duly sworn, depose and say that I am the appellant in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made to the question and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

Yes.

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

$507.00 per month. Libby, McNeil & Libby, 200 South Michigan, Chicago, Illinois 60604.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

No.

3. Do you own any cash or checking or savings account?

No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes.

a. If the answer is yes, describe the property and state its approximate value.

Five shares common stock of previous employer, Quaker Oats Co.; total approximate value: $85.00.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Mary Logan, wife.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

LaVerne L. Logan

Subscribed and Sworn to before me this 19th day of December 1980.

Notary Public

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Does due process prevent the termination of an employment discrimination charge without a hearing on the merits when the sole basis for the termination is that the state administrative agency responsible for investigating charges has negligently failed to convene a fact finding conference within the statutory time period?
2. Does it violate the equal protection rationality standard when a charge of employment discrimination is terminated solely because the state agency responsible for investigating such charges fails to convene a fact finding conference within the statutory time period?

LIST OF PARTIES

Laverne L. Logan, Appellant.

Zimmerman Brush Company, Appellee.

The Illinois Fair Employment Practices Commission.

Delores Neighbors, Investigator of said Commission.

Connie Villaba, Unit Coordinator of said Commission.

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OPINION BELOW

This opinion of the Supreme Court of Illinois is reported at ___ Ill.2d ___, ___ N.E.2d ___, Slip Op. No. 53199 (September 29, 1980), Appendix A at 1a.

JURISDICTION

The judgment of the Supreme Court of Illinois, granting the original writ of prohibition and terminating appellant's pending action before the Illinois Fair Employment Practices Commission was entered on September 29, 1980. See Appendix A at 1a.

The notice of appeal to this Court was duly filed in the Supreme Court of Illinois on December 22, 1980. This appeal is being docketed within 90 days of the judgment below.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 to the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 1, §19, of the Illinois Constitution provides in pertinent part:

> All persons with a physical or mental handicap ... shall be free from discrimination unrelated to ability in the hiring and promotion practices of any employer.

The Illinois Fair Employment Practices Act, Ill. Rev. Stat. ch. 48, §851 et seq. (1979) (recodified as the Illinois Human Rights Act, Ill. Rev. Stat. ch. 68, §1-101 et seq., effective July 1, 1980). Pertinent sections are set forth in Appendix B at a.

STATEMENT OF THE CASE

On September 29, 1980, the Illinois Supreme Court granted appellee Zimmerman Brush Co. ("the Company") a writ of prohibition barring the Illinois Fair Employment Practices Commission ("the Commission") from ever reaching a decision on the merits of appellant Laverne Logan's charge of employment discrimination under the Illinois Fair Employment Practices Act, Ill. Rev. Stat. ch. 48, §851 et seq. (1979), Appendix B at 9a, ("the FEPA"). Although Mr. Logan had complied with all procedural requirements in a timely fashion, his claim was terminated because the Commission had failed to perform its statutory duty of convening a fact finding conference within 120 days of the filing of the charge.

Mr. Logan filed his charge with the Commission on November 14, 1979 alleging that the Company had discriminated against him because of his physical handicap, a club ankle and short right leg. The discrimination occurred when the Company terminated Mr. Logan's employment on November 9, 1979. At the time he filed his charge, Mr. Logan was not represented by an attorney.

Mr. Logan filed his charge pursuant to Section 853(c) of the FEPA, which provides that it is an unfair employment practice to discriminate in the conditions of employment against an individual because of a physical handicap unrelated to ability.

Section 858(8)(a) of the FEPA requires that a person alleging an unfair employment practice file a charge with the Commission within 180 days of the date of the occurrence of the alleged unfair practice. It is then the Commission's responsibility to undertake an investigation to ascertain the facts relating to the alleged unfair employment practice. If the Commission finds "substantial evidence" supporting the charge, it issues a complaint. Ill. Rev. Stat. ch. 48, §858(8)(c) (1979). If the Commission finds "no substantial evidence" and dismisses the charge, the victim of the discrimination can seek judicial review of the Commission's action. Ill. Rev. Stat. ch. 48, §860 (1979). The Commission has 300 days from the date the charge was filed to complete its investigation and either dismiss the charge or issue a complaint. Ill. Rev. Stat. ch. 48, §858(8)(d) (1979).

The FEPA directs the Commission to convene a fact finding conference within 120 days of the date the charge

was filed. The purposes of this conference are: "obtaining evidence, identifying issues in dispute, ascertaining the positions of the parties, and exploring the possibility of a negotiated settlement of the controversy." Ill. Rev. Stat. ch. 48, §858(b) (1979).

In this case, Mr. Logan complied with the 180 day limit for the filing of a charge by filing his charge only five days after the Company terminated his employment. It then was the Commission's responsibility to convene a fact finding conference within 120 days (by March 13, 1980). On January 28, 1980 (45 days before the end of the 120 day period) the Commission notified the parties that they would be required to attend a fact finding conference on March 18, 1980 (five days after the expiration of the 120 day period). Mr. Logan was not represented by an attorney at the time the date of the fact finding conference was set. On January 28, 1980, the Commission also sent a questionnaire to the Company and directed that the Company submit answers by March 10, 1980. On March 7, 1980, the Company submitted answers to the Commission's questionnaire. The Company did not object at this time to the March 18 date for the conference.

On March 18, 1980, at the beginning of the conference, the Company's attorney presented the Commission's investigator with a written motion asserting that because the conference had not been convened within 120 days of filing, the charge should be dismissed. The investigator's supervisor denied the motion, and the Company's attorney refused to participate in the fact finding con-

ference. Mr. Logan continued to appear pro se at the conference.

Two days later, the Company filed a motion for leave to file its petition for an original writ of prohibition in the Illinois Supreme Court. On March 25, 1980, that court entered an order granting the Company leave to file its petition for an original writ of prohibition. The court also stayed proceedings on Mr. Logan's charge pending disposition of the petition.

Mr. Logan sought legal assistance from the Edwin F. Mandel Legal Aid Clinic of the University of Chicago on April 23, 1980. Because 180 days had not passed since the act of discrimination, Mr. Logan filed a new charge raising the identical claim.

Mr. Logan also responded to the Company's petition for a writ of prohibition by filing with the Illinois Supreme Court a motion to dismiss or, in the alternative, to stay proceedings on the Company's petition. He argued that to terminate his claim simply because the Commission had failed to convene a fact finding conference within 120 days would violate his constitutional rights under the Fourteenth Amendment to due process and equal protection. He also argued that because he had filed a second identical charge within the 180 day period, the Company's petition should be denied on the grounds that it had become moot.

The Illinois Supreme Court awarded the Company a writ of prohibition on September 29, 1980. The court rejected both Mr. Logan's constitutional arguments and his claim of mootness. The court held that the Commission's

failure to convene a fact finding conference within 120 days of the filing of the charge terminated Mr. Logan's claim despite the fact that Mr. Logan had complied with all requirements in a timely fashion. The court also said that Mr. Logan should not be allowed to pursue his second charge through the Commission even though again Mr. Logan had complied with all procedural requirements. Zimmerman Brush Co. v. Illinois Fair Employment Practices Commission, Slip Opinion No. 53199 (September 29, 1980), Appendix A at 1a.

THE QUESTIONS ARE SUBSTANTIAL

I. THIS CASE PRESENTS THE SUBSTANTIAL QUESTION OF WHETHER DUE PROCESS PREVENTS AN INDIVIDUAL'S CLAIM FROM BEING EXTINGUISHED SOLELY BECAUSE OF ADMINISTRATIVE NEGLECT.

The Supreme Court of Illinois held below that a person's right to seek redress for unlawful employment discrimination may be extinguished by the negligent conduct of the state's administrative agency. The court decided that although the state legislature had created a right to redress, the inaction or inattention of the state's administrative personnel may make the right meaningless in practice. The case accordingly presents a substantial question concerning the power of state officials to extinguish state-created rights without any process -- indeed, to extinguish them for the very reason that the agency did not follow prescribed procedures.

The problem is bound to arise frequently in Illinois because the Commission, like state and federal courts, is sorely taxed by the volume of cases presented for disposition. This Court has not yet determined the extent

to which an individual may be deprived of an interest solely for reasons of administrative convenience and efficiency. The present case demonstrates how overzealous solutions can violate the due process right of parties to have their cases heard and decided.

In recent opinions, the Illinois Supreme Court has determined that certain deadlines included in the FEPA serve significant public purposes, that these deadlines must be regarded as mandatory, and that no case may proceed if the Commission misses such a deadline. See Springfield-Sangamon County Regional Plan Commission v. Fair Employment Practices Commission, 71 Ill. 2d 61, 373 N.E.2d 1307 (1978); Board of Governors v. Illinois Fair Employment Practices Commission, 78 Ill. 2d 143, 399 N.E.2d 590 (1979), appeal dismissed, 49 U.S.L.W. 3243 (1980); Zimmerman Brush Co. v. Illinois Fair Employment Practices Commission, Appendix A at 1a. The result of these decisions is that Mr. Logan and over 2000 others who have charges pending before the Commission must have their claims extinguished because of the Commission's negligence, and without any decision on the individual merits of each charge.[1/]

This case presents the substantial question of whether an individual has a right to expect some kind of

---

1/ These decisions require that in all cases when the FEPC has failed to observe statutory deadlines, charges must be dismissed. Over 2000 such cases were pending as of 1979. Affidavit of James E. Braxton, Executive Director of the Illinois Fair Employment Practices Commission, Appendix C at 17a.

decision based on the merits of his claim.[2/] What is the minimum treatment which an administrative agency must afford a charge that is brought before it? May an agency terminate a charge without regard to its validity or the diligence of the parties, but only to serve the goal of bureaucratic expedience? In the present case, the Commission accepted and filed Mr. Logan's charge but failed to act upon it within the time required by law. Although he was in no way responsible for the Commission's procedural mistake, his claim has been extinguished without any consideration of its merits. Mr. Logan asks this Court to determine that due process prevents this result.

A. The Termination of Mr. Logan's Claim Without a Decision on Its Merits Violates Due Process.

Mr. Logan asks this Court to determine that the termination of his claim because of the Commission's negligent failure to schedule a fact finding conference within the 120 day period deprived him of due process. This Court has determined that even a legitimate concern for administrative speed and efficiency will not serve to eliminate due process rights.[3/]

2/ Throughout this Jurisdictional Statement, appellant uses the phrases "decision on the merits" and "merit-based decision" to include not only decisions based upon the law and the facts of the underlying charge but also decisions based upon the conduct of the complainant and respondent in the course of proceedings, e.g., dismissal for failure to state a cause of action, default for failure to appear or prosecute, etc.

3/ See, e.g., Stanley v. Illinois, 405 U.S. 645 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969).

Due process requires "an opportunity . . . granted at a meaningful time and in a meaningful manner," Armstrong v. Manzo, 380 U.S. 545, 552 (1965), "for hearing appropriate to the nature of the case," Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). The exact timing of the hearing may vary. Opp Cotton Mills, Inc. v. Administrator, Department of Labor, 312 U.S. 126, 152-53 (1941). The degree of formality may vary. Goss v. Lopez, 419 U.S. 565 (1975).

Regardless of the timing and formality of the hearing, a merit-based decision is the minimum requirement of due process. In Bell v. Burson, 402 U.S. 535 (1971), this Court struck down a Georgia statute which provided for the suspension of the driver's license of an uninsured motorist who was involved in an accident unless security was posted equal to the amount of damages claimed. The statute provided for a hearing, but required that the question of the driver's fault be excluded from consideration at that hearing. Although the Court did not require that a full adjudicative hearing be held, it stated that procedural due process would require a preliminary inquiry to determine whether there was a reasonable possibility that a judgment would be rendered against the licensee. Id. at 540.

In Barry v. Barchi, 443 U.S. 55 (1979), the Court required a merit-based decision before the temporary suspension of a racehorse trainer whose horses had been drugged. Because the state had adduced evidence demonstrating probable cause that the trainer was at least negligent with respect to the drugging, a temporary sus

pension was permissible pending a prompt and effective adversary hearing. In both Fuentes v. Shevin, 407 U.S. 67 (1972) and Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), a decision on the merits was required before a private party could avail himself of state procedures for altering property rights of other private parties even though the alteration would involve only a temporary deprivation. Mathews v. Eldridge, 424 U.S. 319 (1976), held that Social Security disability benefits could be terminated without a prior full hearing because several merit-based decisions were required, i.e., preliminary state review of medical evidence, determination by administrative officials after notice and comment, de novo review and formal hearing. See also Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits not to be terminated without a decision on the merits); Goss v. Lopez, 419 U.S. 565 (1975) (in school suspension cases, students to have rights to informal hearing and review).

The termination of Mr. Logan's claim prevented him from receiving a decision on the merits. First, there was no evaluation of the strength of his case. Mr. Logan agrees that the legislature could provide for the screening of cases by the Commission and that the procedures provided in the FEPA would have been constitutionally sufficient if they had provided for this screening. Mr. Logan also agrees that the use of the "substantial evidence" test in the FEPA for the evaluation of cases is appropriate. In the instant case, however, the Commission never made such a determination. Mr. Logan, in fact, is worse off than if the Commission had found no

substantial evidence, because that finding would have been reviewable in the state courts. Mr. Logan is instead left with no review and no cause of action due to a process which is purely arbitrary.

Second, the termination of Mr. Logan's charge was not based on any procedural failing by him. Mr. Logan did not delay the proceedings. The termination is unlike dismissal for failure to comply with a statute of limitations. Ordinarily the individual controls the initiation of the proceedings and is fairly held accountable for failing to meet statutory deadlines. In this case, Mr. Logan filed his charge only five days after the discriminatory act, well within the 180-day time limit provided by the FEPA. He complied with all the procedural requirements of the statute, only to have his claim extinguished because of neglect by the administrative agency processing it.

Martinez v. California, 444 U.S. 277 (1980), held that a state may limit the due process protections to be afforded certain statutory claims, provided the conduct of the state is not "wholly arbitrary or irrational." Id. at 282. The conduct of the state in terminating Mr. Logan's charge is wholly arbitrary and irrational in violation of the due process clause, because it is based neither on an evaluation of the strength of his claim nor on a determination of his diligence as a plaintiff.

B. A Complainant's Cause of Action Under the Fair Employment Practices Act is an Interest Protected by the Due Process Clause.

Although defendants' rights to due process in civil actions have long been recognized by this Court, the

rights of plaintiffs have not been clearly delineated. This case directly presents the issue of whether a state can arbitrarily and irrationally terminate a plaintiff's cause of action without violating due process. The underlying issue is whether a state-created cause of action to vindicate claims of employment discrimination is protected under the due process clause. This is an open question in light of the holdings in Mullane v. Central Hanover Bank & Trust Co, 339 U.S. 306 (1950); Boddie v. Connecticut, 401 U.S. 371 (1971); United States v. Kras, 409 U.S. 434 (1973); Ortwein v. Schwab, 410 U.S. 656 (1973); and Martinez v. California, 444 U.S. 277 (1980).

The Court has implied that the right of plaintiffs to bring suit to protect existing property rights is itself a protected interest. In Mullane, notice by publication was held insufficient to notify known trust beneficiaries of a judicial settlement of trust accounts. Due process required that the beneficiaries be given the opportunity to appear and be heard at the settlement proceedings. The Court found a protected interest in the rights of parties "to have the trustee answer for negligent or illegal impairments of their interests." 339 U.S. at 313.

In Boddie, the Court left open the question of whether a plaintiff's right of access to the judicial system is a protected interest. Boddie was a class action on behalf of indigent married women who had been barred from access to the courts to obtain divorces by their inability to pay court costs. The Court held that

"a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard." 401 U.S. at 380. Although the suit was brought by "would-be plaintiffs," the Court reasoned that plaintiffs' plight was "akin to that of defendants." Id. at 376. The Court stressed:

> We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual. . . .

Id. at 382-83. The Court addressed this question in two later cases, United States v. Kras, and Ortwein v. Schwab, and found that filing fees may be imposed on indigents in the contexts of bankruptcy and welfare appeals.[4/]

Furthermore, this Court has held that indigent prisoners must be provided at the state's expense with adequate law libraries or adequate assistance from persons trained in the law. In Bounds v. Smith, 430 U.S. 817 (1977), the Court declared that "[i]t is now established beyond doubt that prisoners have a constitutional right of access to the courts." Id. at 821. Bounds held that prisoners have a right of access for filing civil rights actions and prosecuting criminal appeals:

> By contrast [to a discretionary review petition] in this case, we are concerned in large part with original actions seeking new trials, release from confinement, or vindication of fundamental civil rights. Rather than presenting claims that have been passed on by two courts, they frequently raise heretofore unlitigated issues. As this Court has

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4/ See "Developments in the Law--Class Actions," 89 Harv. L. Rev. 1318, 1404 (1976), which noted that commentators are divided on when a plaintiff's right to file a cause of action is a protected interest.

> "constantly emphasized," habeas corpus and civil rights actions are of "fundamental importance . . . in our constitutional scheme" because they directly protect our most valued rights.

Id. at 827 (citations omitted; emphasis added). Similarly, the appellant in the instant case seeks the right of access to the judicial system to vindicate an important civil rights -- the right to be free from unlawful discrimination in his employment.5/

In Martinez v. California, the Court explicitly left open the question of whether due process attaches to a wrongful death action. This Court recognized that a state-created cause of action is arguably "a species of 'property' protected by the Due Process Clause." 444 U.S. at 281-82. However, a resolution of this issue was not reached in Martinez because the Court determined that, even if the plaintiff's claim was a protected interest, due process had not been violated.

The FEPA creates interests which are entitled to due process protection. It establishes a substantive right to discrimination-free employment and a cause of action to vindicate that right. The FEPA affirmatively attempts to regulate private employer conduct to protect that right, offering individuals protection from discrimination on the basis of race, color, religion, sex, national origin, ancestry or physical or mental handicap. The statute provides for the awarding of attorney's fees to a

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5/ The Bounds "right of access" reasoning has been extended to civil actions outside the prisoners' rights realm. See Britt v. Suckle, 453 F. Supp. 987, 1002 (E.D. Tex. 1978) (where the court held that "adjudication of state-granted rights [to a negligence claim] is implicit in the whole constitutional scheme.")

successful complainant. Employers are expressly prohibited from retaliating against employees who have opposed any discriminatory act or who have "made a charge, testified or assisted in any investigation, proceeding, or hearing under the [FEPA]." Ill. Rev. Stat. ch. 48, §853 (d) (1979). Employees are thus affirmatively encouraged to rely on the statutory protection and to file claims under the statute.

The interests protected by the FEPA are particularly important. The enactment of the FEPA itself evidences a strong state policy against employment discrimination. The right is also guaranteed by the Illinois Constitution, which states in relevant part that "[a]ll persons with a physical or mental handicap ... shall be free from discrimination unrelated to ability in the hiring and promotion practices of any employer." Ill. Const. art. I, §19. Freedom from discrimination involves a right underlying the prohibition against unequal treatment in the Fourteenth Amendment. The FEPA is part of the joint federal-state effort to combat employment discrimination envisioned by Congress when it enacted Title VII. 42 U.S.C. §2000e-5. Furthermore, the FEPA protects an individual's employment, which, like the welfare benefits in Goldberg v. Kelly, 397 U.S. 254, 264 (1970), provided Mr. Logan with "the very means by which to live. . . ."

The cause of action created by the FEPA is to be sharply distinguished from an action totally controlled by an agency or government official such as that provided for by the National Labor Relations Act, 29 U.S.C. §151 et seq. ("NLRA"). Under the NLRA, the cause of action

for an unfair labor practice vests in the National Labor Relations Board ("NLRB") and the prosecution of such a case is controlled entirely by the NLRB General Counsel. The unfair labor practice complainant has no control over the prosecution of his case and the General Counsel's refusal to issue a complaint is not reviewable either by the NLRB or, in general, by the courts. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 138-39 (1975).

By contrast, a victim of employment discrimination is given a private cause of action under the FEPA. In cases where the Commission finds substantial evidence within the 300 days allotted under the statute, it issues a complaint. From that point on, the action is controlled entirely by the complainant. The complainant prosecutes his own case, filing appropriate motions, controlling discovery and pre-hearing procedures, and presenting evidence and argument at a public hearing. Ill. Rev. Stat. ch. 48, §858.01(b) (1979). Additionally, the FEPA gives a complainant the right under the Administrative Review Act for judicial review in the Circuit Court of any "order of the Commission," including review of a Commission's finding of no substantial evidence or a final Commission decision on the merits. Ill. Rev. Stat. ch. 48, §860 (1979). The only time that the progress of the proceedings is out of the control of the complainant is during investigation by the Commission.

Mr. Logan not only had a private cause of action, but had already filed his charge pro se with the Commission and was awaiting his fact finding conference when his rights were terminated. Thus, his case presents a

number of factors that justify due process protection: (1) a private cause of action; (2) an important state policy against discrimination; (3) a claim that had already been filed; and (4) a pro se claim in an administrative structure designed to adjudicate pro se claims.

The private cause of action created by the FEPA is a protected interest within the meaning of the Fourteenth Amendment, not merely a right conditioned upon the absence of neglect on the part of the Commission. Six members of this Court in Arnett v. Kennedy, 416 U.S. 134 (1974), rejected the claim that a state statute may simultaneously create a substantive right and limit the circumstances in which that right may be vindicated. As stated by Mr. Justice Powell, "[t]his view misconceives the origin of the right to procedural due process. That right is conferred, not by legislative grace, but by constitutional guarantee." Once the legislature has conferred a protected interest, "it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." Id. at 167 (Powell, J., concurring).

II. THIS CASE PRESENTS THE SUBSTANTIAL QUESTION OF WHETHER TERMINATION OF MR. LOGAN'S CLAIM SOLELY BECAUSE THE ILLINOIS FAIR EMPLOYMENT PRACTICES COMMISSION FAILED TO CONVENE A FACT FINDING CONFERENCE WITHIN 120 DAYS IS IRRATIONAL AND VIOLATES EQUAL PROTECTION.

This Court should determine the termination of rights solely because of the Commission's failure to convene a fact finding conference within 120 days is irrational in violation of equal protection. Two claims may be filed at the same time and involve the same

allegations, yet one of these claims would be investigated and adjudicated, while the other, through no fault of the claimant, would be dismissed with no determination of its merits. Rather than drawing a distinction between two such cases based on their relative strength or the diligence of the parties in prosecuting their claims, the Supreme Court of Illinois has determined that the distinction may be based solely on the action or inaction of the Commission -- be it negligent, malicious, or haphazard.

This Court has consistently recognized that statutory classifications must meet the minimum test of rationality in order to comply with the requirements of equal protection.[6/] A test of legislative enactments was formulated by Chief Justice Warren writing for a unanimous Court in McGowan v. Maryland, 366 U.S. 420 (1961):

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

Id. at 425-26.

In recent years, this Court has continued to examine legislative classifications by considering whether there is a rational basis for the classification in light of

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6/ See, e.g., Jimenez v. Weinberger, 417 U.S. 628 (1974); Royster Guano Co. v. Virginia, 253 U.S. 412 (1920); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

the legislative purposes to be served. Under this approach, the Court will not overturn a statutory classification

> unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.

Vance v. Bradley, 440 U.S. 93, 97 (1979). Most recently, in United States Railroad Retirement Board v. Fritz, 49 U.S.L.W. 4035 (1980), this Court noted that the tests applied in earlier cases have not been "altogether consistent." Id. at 4038. In Fritz, the Court examined the rationality of the Congressional determinations underlying the statutory classification, and asked whether "Congress achieved its purpose in a patently arbitrary or irrational way." Id.7/

The classification at issue in the present case fails to provide equal protection under any minimum scrutiny test articulated by this Court. The failure of the Commission to hold a fact finding conference within 120

7/ In Stanley v. Illinois, 405 U.S. 645 (1972), this Court held unconstitutional a statute providing that unwed fathers could lose parental rights without a hearing on the merits of their fitness as parents, while providing for such hearings for married parents and unwed mothers. This Court found that the statute denied unwed fathers the basic procedural right of a decision on the merits of a claim in the state courts, and concluded on the basis of this finding that the law was "inescapably contrary to the Equal Protection Clause." Id. at 658. The Court characterized its analysis as, "[p]redicating a finding of constitutional invalidity under the Equal Protection Clause of the Fourteenth Amendment on the observation that a State has accorded bedrock procedural rights to some, but not to all similarly situated. . . ." Id. n. 10. The Illinois Supreme Court has denied to Mr. Logan the same bedrock right to a decision on the merits which it accords all complainants whose charges are properly processed under the 120-day rule.

days is not a rational way of choosing which cases should be allowed to proceed. This rule penalizes complainants, even though they have no control over meeting the deadline. It operates without regard to the relative merits of particular cases.

Furthermore, such a rule bears no reasonable relation to the two legislative purposes of the FEPA: to protect persons from discrimination in employment "because of race, color, religion, sex, national origin, ancestry, physical or mental handicap unrelated to ability or unfavorable discharge from military service" and to protect employers from "unfounded charges of [employment] discrimination." Ill. Rev. Stat. ch. 48, §851 (1979). Explaining these purposes in its discussion of fact finding conferences, the Supreme Court of Illinois stated that the conferences serve "the interests of both employee and employer," and that the Commission may avoid "unnecessary costs" if a settlement can be reached. Finally, the conference "places the Commission in a better posture to decide whether to dismiss the employee's charge" or process it further. Zimmerman Brush Co., Appendix A at 5a.

The purposes expressly stated in the FEPA, as well as those which the Supreme Court of Illinois found applicable to fact finding conferences, may be realized only through a determination on the merits of each charge of employment discrimination. A victim of discrimination may obtain a remedy for the wrong he has suffered only if his case is decided. Similarly, an innocent employer may be cleared of a charge only if a decision is reached on

the merits. The interests of both parties and the Commission in an early settlement and efficient processing of the case can be served only if there is an opportunity to evaluate the merits of that case.

Mr. Logan concedes that the legislature and the courts may properly be concerned about administrative backlogs. However, while random or arbitrary termination of claims will reduce the backlog, such an approach cannot be reconciled with the purpose of the statute. In Reed v. Reed, 404 U.S. 71 (1971), the Supreme Court struck down a legislative classification by which men who applied for appointment as administrators were given preference over similarly situated women, without any determination on the merits of their respective applications. The Court found the goal of the classification to be avoidance of contests between relatives of the decedent for selection as administrator. Although this goal may be legitimate, elimination of a category of persons who are seeking a decision on the merits of their applications is not a rational means to accomplish it:

> Clearly, the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question, however, is whether [the statute] advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not. To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment. . . .

Id. at 76. See Stanley v. Illinois, 405 U.S. at 656-657. ("The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest. . . . But the Constitution recognizes higher values

than speed and efficiency. . . . Procedure by presumption is always cheaper and easier than individualized determination.") If backlogs are to be reduced, the charges must be screened, the unmeritorious cases dismissed, and the meritorious cases decided.8/

A scheme which terminates a charge solely because the Commission fails to convene a timely fact finding conference creates two irrational distinctions between otherwise indistinguishable claims. The first is that one will be afforded a decision on the merits while the other will never be decided. The second distinction involves the availability of judicial review. If the Commission investigates a charge and finds no substantial evidence, it dismisses the charge, but the complainant retains the right under the Administrative Review Act for judicial review in the Circuit Court. Ill. Rev. Stat. ch. 48, §860 (1979). If the Circuit Court reverses the dismissal, it will remand to the Commission for issuance of a complaint and adjudication through a public hearing. On the other hand, the complainant receives much worse treatment if his case is terminated due to the Commission's failure to convene a timely fact finding conference. Termination under these circumstances is not reviewable under the Administrative Review Act because it

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8/ The state's solution to the problem appears to have more in common with speedy trial rules for criminal cases than with any precedent in civil cases. If the case does not move quickly enough, it will be dismissed. That may well be the best way to deal with criminal matters, for the burden of delay falls on the public as a whole. But in this civil matter the whole burden of delay falls on the complainant, the very party whose rights were violated.

is not an "order of the Commission." Ill. Rev. Stat. ch. 48, ¡860 (1979). Thus, this irrational scheme allows even an unfounded or frivolous charge to be decided on its merits and permits judicial review of that decision if the Commission complies with the 120 day deadline. When the Commission is negligent, however, even a valid charge is never decided and no review is possible.

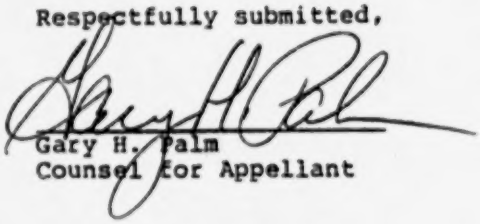
Finally, there is no escape from the irrationality of the Illinois Supreme Court's decision. When the Company filed its Petition for Writ of Prohibition with the Supreme Court of Illinois, the time period allowed by statute for the filing of the charge had not yet run. Mr. Logan, who had previously been without legal assistance, sought counsel and filed a second, identical claim of discrimination. In so doing, he hoped to cure the problem caused by the Commission's failure to convene a timely fact finding conference. However, the Supreme Court of Illinois dismissed the second charge, stating that to proceed with it "would frustrate the design" of the statutory scheme. Zimmerman Brush Co., Appendix A at 8a.

Thus, despite diligence beyond that required of him by the FEPA, Mr. Logan has lost his right to a cause of action. A rule requiring dismissal under the circumstances present in this case is irrational and unjust, and this Court should determine that it violates equal protection.

CONCLUSION

For these reasons, the appellant Laverne Logan respectfully prays that this Court note probable jurisdiction of this appeal.

Respectfully submitted,



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OPINION

SUPREME COURT OF ILLINOIS

United States of America

State of Illinois } ss.
Supreme Court }

At a Term of the Supreme Court, *begun and held in Springfield, on Monday, the* eighth *day of* September *in the year of our Lord, one thousand nine hundred and* eighty *, within and for the State of Illinois.*

PRESENT: JOSEPH H. GOLDENHERSH, CHIEF JUSTICE

JUSTICE ROBERT C. UNDERWOOD — JUSTICE DANIEL P. WARD

JUSTICE HOWARD C. RYAN — JUSTICE WILLIAM G. CLARK

JUSTICE THOMAS J. MORAN — JUSTICE THOMAS E. KLUCZYNSKI

TYRONE C. FAHNER ATTORNEY GENERAL

LOUIE F. DEAN, MARSHAL

ATTEST: CLELL L. WOODS, CLERK

Be It Remembered, *that afterwards, to-wit, on the* 29th *day of* September *, 19* 80 *the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:*

Zimmerman Brush Company, an Illinois corporation,
Petitioner

No. 53199 vs.

The Illinois Fair Employment Practices Commission, a State Agency; et al., etc.,
Respondents

} Prohibition

CLELL L. WOODS
CLERK OF THE SUPREME COURT
STATE OF ILLINOIS

10 (10827—334—12-78)

Docket No. 53199—Agenda 49—May 1980.

ZIMMERMAN BRUSH COMPANY, Petitioner, v. THE ILLINOIS FAIR EMPLOYMENT PRACTICES COMMISSION, Respondent.

MR. JUSTICE WARD delivered the opinion of the court:

On November 9, 1979, Laverne Logan was discharged from his employment at the Zimmerman Brush Company (company) in Chicago, on the ground that he was unable to perform his duties on an assembly line due to a physically handicapped left leg. On November 14, Logan filed a charge with the Illinois Fair Employment Practices Commission (Commission) claiming that he had been discriminated against because of his handicap. On January 30, 1980, the company was notified by the Commission to be present at a fact-finding conference set for March 18, 1980, in order to "define the issues, determine which facts are undisputed, obtain evidence, and ascertain whether there is a basis for a negotiated settlement of the charge." The company was also asked to complete a two-page questionnaire regarding the circumstances of Logan's discharge. The company answered the questionnaire and returned it on March 7.

On March 18 the company appeared for the sole purpose of moving to dismiss the charge on the ground that the conference was convened 125 days after Logan's charge was filed, which was beyond the 120-day period provided for in the Fair Employment Practices Act (Ill. Rev. Stat. 1979, ch. 48, par. 858(b)). Since the meeting was not held within the prescribed period, the company said the Commission lost jurisdiction and should dismiss the charge. Upon the oral denial of the motion and the hearing officer's statement that the conference was to proceed, the company refused to participate and left the meeting.

On March 20 the company moved in this court for leave to file a petition for writ of prohibition under Supreme Court Rule 381(a) (73 Ill. 2d R. 381(a)). On March 25 the motion was allowed, briefs were ordered, the proceeding before the Commission was stayed, and oral argument on whether the writ should be allowed was set for June 25. On April 30, Logan filed a second charge with the FEPC which was identical to the first. The Commission notified the company of its intention to proceed with the second charge and the company moved to stay

the second proceeding pending a decision on its petition for a writ of prohibition. We allowed the motion to stay.

The controversy here concerns the interpretation to be given section 8(b) of the Fair Employment Practices Act, which provides:

> "(b) Within 120 days of the proper filing of a charge, the Commission shall convene a fact finding conference (unless the charge has been withdrawn or dismissed) for the purposes of obtaining evidence, identifying issues in dispute, ascertaining the positions of the parties, and exploring the possibility of a negotiated settlement of the controversy. Notice of such conference shall be given to all parties at least 10 days prior thereto and a default order may be entered against any party who fails to attend such conference without good cause shown." Ill. Rev. Stat. 1979, ch. 48, par. 858(b).

The company contends that the legislature, in providing that the Commission "shall convene" a fact-finding conference within 120 days after a charge has been filed with the Commission, intended to make mandatory the convening of a fact-finding conference within this prescribed time period. It contends further that a failure by the Commission to do so would result in an automatic dismissal of the charge. The Commission's position is that the provision in section 8(b) for convening a conference is only directory and that one may be called beyond the 120-day period. The complainant Logan states that, even if "shall convene" is deemed here to be mandatory, the automatic dismissal of his charge should not be the consequence of the Commission's failure to convene the conference within the prescribed statutory period.

The use of "shall" in a statutory provision does not of itself require that the provision be held to be mandatory rather than directory. One must consider the word within the context of the entire statute, looking particularly to the purpose of the legislation. (See *Miller v. Department of Registration & Education* (1979), 75 Ill. 2d 76, 81; *In re Armour* (1974), 59 Ill. 2d 102, 104; *Carrigan v. Illinois Liquor Control Com.* (1960), 19 Ill. 2d 230, 233.) Applying this principle we judge that the legislative direction to convene a fact-finding conference within the 120-day period is a mandatory one.

Section 8(b) was approved and became effective in September of 1978 shortly after this court interpreted the existing section 8(c), which required that the FEPC decide

whether or not a complaint "shall" issue within 180 days after receipt of an employee's charge. In *Springfield-Sangamon County Regional Plan Com. v. Fair Employment Practices Com.* (1978), 71 Ill. 2d 61, this court analogized the 180-day period to a period of a statute of limitations and also noted the financial impact upon an employer who might be confronted by a complaint long after the alleged unfair employment practice. The court went on to hold that "the 180-day period prescribed in the statute was intended to ensure expeditious action on behalf of the FEPC, and must be considered mandatory." (71 Ill. 2d 61, 68.) It was also observed: "The respondents have the right to expect that the impact of such administrative orders will be minimized by compliance with the statutory time limitations." (71 Ill. 2d 61, 73.) Shortly thereafter in *Board of Governors v. Illinois Fair Employment Practices Com.* (1979), 78 Ill. 2d 143, 149, the decision in *Springfield-Sangamon* was upheld as being "clear and unequivocal," and this court issued a writ of prohibition against the Commission, which had filed a complaint more than two years after the expiration of the 180-day statutory period.

As stated, section 8(b), requiring that "the Commission shall convene a fact finding conference" within 120 days after receiving an unfair employment practices charge, was added to the Act by amendment eight months after the decision in *Springfield-Sangamon*. We consider that the legislature's use again of the term "shall" in section 8(b) indicates an intention that the prescription of a 120-day period be given a mandatory construction. This court has stated that where "previously construed terms in the unamended sections are used in the amendment, it is generally concluded that the legislature intended to adopt the prior construction given to these terms." (*Hupp v. Gray* (1978), 73 Ill. 2d 78, 86, citing 1A Sutherland, Statutes and Statutory Construction sec. 22.35 (4th ed. 1972).) Though the question here is not identical, the principle of construction is applicable especially where, as here, the term previously construed appears in a later amendment to the same section of the statute. It is a canon of construction that the General Assembly is presumed to know how the courts have interpreted a particular statute and to have acted thoroughly and conscientiously. (See, *e.g.*, *People v. Manning* (1979), 76 Ill. 2d 235, 241. See also 2A Sutherland, Statutes and Statutory Construction sec. 57.05 (4th ed. 1973).) It is reasonable

to consider that under these circumstances the legislature intended to adopt the prior construction of "shall."

The Commission would have us hold that the legislative pronouncement is but directory. It argues that the financial impact upon the employer in *Springfield-Sangamon*, when confronted with the prospect of being liable for back pay and interest over an extended period of time, was far greater than whatever impact there might have been here by a delay of five days in scheduling a conference.

We deem that this contention that the conference should be allowed to proceed beyond the 120-day period interprets *Springfield-Sangamon* too narrowly and ignores the goals underlying section 8(b). The fact-finding conference is specifically designed "for the purposes of obtaining evidence, identifying issues in dispute, ascertaining the positions of the parties, and exploring the possibility of a negotiated settlement of the controversy." (Ill. Rev. Stat. 1979, ch. 48, par. 858(b).) Before the provision was added to the Act in 1978 there was no formal opportunity for expeditiously resolving a dispute. The only indication of whether it was deemed that the employee's charge was supported by "substantial evidence" (Ill. Rev. Stat. 1979, ch. 48, par. 858(c)) would be on or before the 180th day after the filing of the charge when the Commission's decision to issue a complaint against the employer or not to issue a complaint was announced.

Under section 8(b) the interests of both employee and employer can be served in that each is given an opportunity to discuss and possibly settle the dispute without formal action being taken against the employer by the Commission. Through a conference, unnecessary costs may be avoided and the Commission permitted to devote itself to other matters. Even if a settlement is not reached at this stage, the proceeding can be importantly valuable to the Commission in that the conference not only places the Commission in a better posture to decide whether to dismiss the employee's charge, it also aids the Commission in setting up a procedural framework for the conciliatory process which follows. (See Ill. Rev. Stat. 1979, ch. 48, par. 858(c).) The public interest in an expeditious resolution of disputes which is made possible though section 8(b) is not less important than the financial considerations discussed in *Springfield-Sangamon*. Avoiding unnecessary

expenditures of time and money by all parties serves to further the stated policy of the Act, which is not only to protect employees from unfair employment practices but also to protect "employers, labor organizations and employment agencies from unfounded charges of discrimination." Ill. Rev. Stat. 1979, ch. 48, par. 851.

That a default order may be entered against a party failing to attend the conference not only illustrates the importance the legislature attached to this stage of the proceedings but also it supports our view that the provision for the convening of a conference within 120 days is a mandatory one. In *Tuthill v. Rendelman* (1944), 387 Ill. 321, 350, the court cited *Clark v. Quick* (1941), 377 Ill. 424, 430, where it was said: "Where terms of the statutes are peremptory and exclusive, where no discretion is reposed or where penalties are provided for its violation, the provisions of the act must be regarded as mandatory."

We cannot adopt the employee's contention that the Commission's failure to convene a fact-finding conference should not result in the automatic dismissal of the action and that the Commission should be allowed to proceed without a conference having been held. To adopt this position would frustrate the purpose of attempting to facilitate just and expeditious resolutions of employment disputes. The fact-finding conference was clearly intended to be an integral and mandatory phase of the complaint process. Such conferences benefit the Commission, the employee and employer, and, of course, the public interest. Without a required fact-finding conference the Commission would in most instances have to proceed solely on the basis of the employee's charge. Unless the Commission would be able to obtain information regarding the charge from some independent investigation its decision of whether or not to file a complaint would hardly be an informed one.

The Commission and Logan also contend that the company waived its right to object to the Commission's decision to proceed with the conference on the 125th day and also is estopped from claiming that the Commission has lost jurisdiction over the dispute. The contention is founded upon the company's response to the Commission's questionnaire regarding the circumstances of the employee's discharge. The questionnaire was filed with the Commission on March 7, six days before the 120-day

period had expired and 11 days before the date on which the conference was actually convened on March 18.

The contention must be denied. The company simply complied with the Commission's direction or request in completing the questionnaire. Had it not done so, as the company points out, it would have been responsible for delaying the proceeding. Too, it is not shown that the company was aware that the 120-day period under section 8(b) would expire before the scheduled date of the conference. We do not find a basis for estoppel or waiver. See generally *Pantle v. Industrial Com.* (1975), 61 Ill. 2d 365; *Levin v. Civil Service Com.* (1972), 52 Ill. 2d 516; *Lowenberg v. Booth* (1928), 330 Ill. 548; *Town & Country Bank v. James M. Canfield Contracting Co.* (1977), 55 Ill. App. 3d 91.

We also are not persuaded by the employee's protests that his rights to due process and equal protection were violated. The statutory scheme here was to provide, through administrative and judicial channels, a means of relief from discriminatory employment practices. The legislature could establish reasonable procedures to be followed upon a charge, and the observance of them here did not violate his constitutional rights.

The employee makes two other arguments. He says that the question regarding his charge against the company has been mooted because he filed a second and identical charge against the company before the 180-day statutory period within which a charge must be filed had expired. This, he argues, allows the Commission to proceed as if the first charge had never been filed. He further contends that the second charge is governed by the Illinois Human Rights Act, which became effective on July 1, 1980. (Ill. Rev. Stat., 1979 Supp., ch. 68, par. 1–101 *et seq.*). Logan directs attention to section 7–102(C)(3), which he says makes the convening of a fact-finding conference discretionary with the Commission. That section provides:

> "Upon reasonable notice to the complainant and the respondent, the Department may conduct a fact-finding conference. The fact-finding conference shall be held within 120 days of the date on which a charge has been filed unless waived by the parties in writing 10 days before the 120 day period has expired." Ill. Rev. Stat., 1979 Supp., ch. 68, par. 7–102(C)(3).

The argument ignores the principle that a statute will be given prospective application unless there is a

clear expression of legislative intent that it is to be retroactively applied. (See, *e.g.*, *People ex rel. American Federation of State, County & Municipal Employees v. Walker* (1975), 61 Ill. 2d 112; *Vendo Co. v. Stoner* (1974), 58 Ill. 2d 289, *cert. denied* (1975), 420 U.S. 975, 43 L. Ed. 2d 655, 95 S. Ct. 1398; *Country Mutual Insurance Co. v. Knight* (1968), 40 Ill. 2d 423.) It is evident there is nothing in the above-quoted section to require or permit retroactive application.

Too, this controversy was not made moot by the employer's filing a second charge with the Commission. As the complainant interprets the Act, as long as the 180 days within which he may file a charge with the Commission under section 8(a) have not expired, he is entitled to file another charge. To be consistent, it would seem he would have to contend that this would be so regardless of the fact that the Commission had dismissed an earlier charge or, as in this case, had failed to convene a fact-finding conference within 120 days, which resulted in the dismissal of the charge. To allow such interpretation, however, obviously would frustrate the design of sections 8(a) and 8(b) and, in a case such as this one, would allow the Commission, despite its failure to comply within the Act, to proceed on an identical charge after the first charge had already expired or suffered dismissal. Not only would an employer's rights be prejudiced if an employee were allowed to file a second and successive charge, but also the public interest in promoting an expeditious resolution of charges would be circumvented.

For the reasons given, the petition for writ of prohibition is allowed.

Writ awarded.

FAIR EMPLOYMENT PRACTICES ACT

AN ACT to promote the public health, welfare and safety of the People of the State of Illinois by reducing denial of equality of employment opportunity.

851. Declaration of policy

Declaration of policy. Whereas denial of equal employment opportunity because of race, color, religion, sex, national origin, ancestry, physical or mental handicap unrelated to ability, or unfavorable discharge from military service, with consequent failure to utilize the productive capacities of individuals to the fullest extent deprives a portion of the population of the State of earnings necessary to maintain a reasonable standard of living, thereby tending to cause resort to public charity and may cause conflicts and controversies resulting in grave injury to the public safety, health and welfare:

Therefore, it is declared to be the public policy of this State that without in any way precluding any employer from selecting between persons of equal merit, ability, and capabilities, equal employment opportunity or apprenticeship opportunity without discrimination because of race, color, religion, sex, national origin, ancestry, physical or mental handicap unrelated to ability, or unfavorable discharge from military service should be protected by State law.

It is also the public policy of this State to protect employers, labor organizations and employment agencies from unfounded charges of discrimination.

853. Unfair employment practices.

(c) For any labor organization because of the race, color, religion, sex, national origin, ancestry, physical or mental handicap unrelated to ability, or unfavorable discharge from military service, military service, of any person to discriminate against such person, or to limit, segregate or classify its membership with respect to such person, or to limit such person's employment opportunities, such person's selection and training for apprenticeship in any trade or craft, or otherwise to take, or fail to take, any action which affects adversely such person's status as an employee or as an applicant for employment or as an apprentice, or as an applicant for apprenticeships, or such person's wages, tenure, hours of employment or apprenticeships conditions; or

(d) For any employer, employment agency or labor organization to discriminate against any person because he or she, reasonably and in good faith, has opposed any practice forbidden in this Act, or because he or she, reasonably and in good faith, has made a charge, testified or assisted in any investigation, proceeding or hearing under this Act. . . .

856. Powers and duties of the Commission

Powers and duties of the Commission. In addition to other powers and duties prescribed in this Act, the Commission shall have the powers and duties enumerated in Sections 6.01 through 6.08.

858. Procedure--Charge, investigation, conference, settlement and adjustment

Procedure--Charge, investigation, conference, settlement and adjustment. (a) Whenever within 180 days after the date that an unfair employment practice allegedly has been committed, a charge in writing under oath or affirmation is filed with the Commission by a complainant or by the Commission upon a vote of at least 3 members and in such detail as to substantially apprise any party properly concerned as to the time, place and facts with respect to such alleged unfair employment practice, that any employer, labor organization, employment agency, or person, hereinafter referred to as a respondent, has committed such unfair employment practice, the Commission shall promptly serve a copy of the charge within 10 days on the respondent and thereafter shall institute an investigation by its employees to ascertain the facts relating to such alleged unfair employment practice.

(b) Within 120 days of the proper filing of a charge, the Commission shall convene a fact finding conference (unless the charge has been withdrawn or dismissed) for the purposes of obtaining evidence, identifying issues in dispute, ascertaining the positions of the parties, and exploring the possibility of a negotiated settlement of the controversy. Notice of such conference shall be given to all parties at least 10 days prior thereto and a default order may be entered against any party who fails to attend such conference without good cause shown.

(c) If it is determined by the Commission, after such investigation, that there is not substantial evidence that the alleged unfair employment practice has been committed, the charge shall be dismissed; otherwise, a Commissioner or an attorney licensed to practice in Illinois, designated by the Commission, shall endeavor to eliminate the effect thereof and prevent repetition thereof by means of conference and conciliation. The complainant and respondent shall be notified of the time and place of the conference by registered or certified mail at least 10 days prior thereto and either or both parties shall appear at such conference or conciliation in person or by attorney. The place fixed shall be within 35 miles of the place where the unfair practice is alleged to have been committed. What occurs in the conference or conciliation meeting shall not be disclosed by the Commission unless the complainant and respondent agree in writing that such disclosure be made. When a settlement is effectuated in conference and conciliation conducted by a Commissioner or attorney, the terms of settlement and adjustment shall be subject to the approval of the Commission. The Commission shall notify the

complainant and the respondent of the disposition of every charge filed and the terms of any settlement, adjustment or dismissal thereof. Any member of the Commission who takes part in an investigation shall thereby be disqualified to hear any evidence on the cause in question. Except as provided in this Section, the manner and form of filing charges shall be in accordance with such rules and regulations as the Commission shall from time to time prescribe. If a settlement is effectuated, and the terms thereof are approved by the Commission, then the Commission shall prepare written terms of settlement and adjustment and have the complainant and respondent agree to them in writing. The Commission shall then enter upon all parties an order in accord with the executed written terms of settlement and adjustment. If the Commission determines after an investigation that there is substantial evidence that the respondent has violated the terms of settlement and adjustment and the order entered pursuant thereto, the Commission may either commence an action pursuant to Section 11 of this Act, or issue a written complaint and order a public hearing on such alleged violation, and, finding that such alleged violation has occurred, may then order such remedies as may be necessary to correct the violation. If the Commission finds that no violation has occurred it shall dismiss the complaint. If terms of settlement and adjustment not approved by the Commission are entered into by a complainant and respondent, the Commission need not enter an order in accord therewith and may terminate further proceedings in the case. The Commission may dismiss a charge if, in conference and conciliation, it is established to the satisfaction of the Commission that the respondent has taken steps to eliminate the effects of the unfair employment practice charged and prevent the repetition thereof, or if, in conference and conciliation, the respondent offers and complainant declines to accept terms of settlement and adjustment which the Commission finds are sufficient to eliminate the effects of the unfair employment practice charged and prevent the repetition thereof.

(d) The Commission shall, within 180 days after the expiration of the 120 day period specified in paragraph (b), or within any extension of the 180 day period agreed to in writing by all parties and approved by a member of the Commission, either issue and serve a complaint in the manner and form set forth in Section 8.01 or shall order that no complaint be issued. Any such order shall be duly served upon both the complainant and respondent.

858.01. Procedure--Complaint, answer, hearing and order

Procedure--Complaint, answer, hearing and order. (a) In case of failure to settle or adjust any such charge by conference and conciliation in accordance with Section 8 of this Act, the Commission shall cause to be issued and served upon such respondent a written complaint, under oath or affirmation, stating the charge of unfair employment practice substantially as alleged in the charge theretofore filed with the Commission as here

inbefore provided in Section 8 of this Act and the relief sought on behalf of the person aggrieved and containing a notice of public hearing before a Commissioner or a duly appointed Adjudicator at a place therein fixed, to be held not less than 30 nor more than 90 days after the service of such complaint. The place fixed shall be within 100 miles of the place where the unfair employment practice is alleged to have been committed.

(b) Any complaint may be amended under oath by leave of the Commissioner or Adjudicator conducting the public hearing, for good cause shown, upon reasonable notice to all interested parties at any time prior to the issuance of an order based thereon. A motion that the complaint be amended to conform to the evidence, made prior to the close of the public hearing, may be addressed orally on the record to the Commissioner or Adjudicator conducting the public hearing and, if such a motion is made, it shall be granted for good and sufficient cause. The respondent shall file an answer under oath or affirmation to the original or amended complaint within 30 days of the date of service thereof, but the Commissioner or Adjudicator conducting the public hearing may, for good cause shown, grant further time for the filing of an answer. In the event that the respondent files a motion to dismiss the complaint within 30 days and the motion is denied by the Commissioner or Adjudicator conducting the public hearing, the time for filing the answer shall be within 15 days of date of denial of the motion. Any allegation in the complaint which is not denied or admitted in the answer is deemed admitted unless the respondent states in the answer that he is without sufficient knowledge or information to form a belief with respect to such allegation. The failure to file an answer is deemed to constitute an admission of the allegations contained in the complaint. The respondent has the right to amend his answer upon leave of the Commissioner or Adjudicator conducting the public hearing, for good cause shown. Both the complainant and the respondent may appear at the hearing and examine and cross-examine witnesses.

The testimony taken at the hearing shall be under oath or affirmation and a transcript thereof made and filed in the office of the Commission. The testimony taken at the hearing is subject to the same rules of evidence that apply in courts of this State in civil cases.

(c) When all the testimony has been taken, the Commissioner or Adjudicator shall determine whether the respondent has engaged in or is engaging in the unfair employment practice with respect to the person aggrieved as charged in the complaint. A determination sustaining a complaint shall be based upon a preponderance of the evidence. The Commissioner or Adjudicator then shall state his recommendations in writing and, if he finds against the respondent, shall issue and cause to be served on such respondent and the complainant a recommended order requiring such respondent to cease and desist from the unfair employment practice complained of, and to take such further affirmative or other actions

with respect to the person aggrieved, including but not limited to reinstatement or hiring, back pay, costs, and reasonable attorney fees where appropriate, as will eliminate the effect of the practice complained of. An award of back pay shall not be made for any period more than two years prior to the filing of the charge. If, upon all the evidence, the Commissioner or Adjudicator finds that a respondent has not engaged in the unfair employment practice charged in the complaint or that a preponderance of the evidence does not sustain the complaint, he shall state his findings of fact and shall issue and cause to be served on the respondent and the complainant a recommended order dismissing the complaint. Such a recommendation order dismissing the complaint may include an award of reasonable attorney fees in favor of the respondent if it is determined that the complaint was frivolous or unreasonable or that the complainant continued to litigate after it clearly became so.

858.01a. Actions--Injunctions--Limitation

In the case of any charge of an unfair employment practice which has been properly filed with the Commission prior to March 30, 1978, which has not been settled or adjusted by conference and conciliation under Section 8, and which within 180 days thereafter has not been the subject of a complaint issued by the Commission or an order that no complaint be issued, the person filing the charge may seek appropriate injunctive or other relief by filing an action in the circuit court of the county where the alleged unfair employment practice occurred, and if the person prevails in such action the court may award such person costs and reasonable attorneys' fees. The Commission shall notify all such persons by registered mail of their right to seek such relief and any such action must be initiated in the circuit court within 2 years of the receipt of such notice, notwithstanding any other statute of limitations imposed on such actions.

858.02. Procedure--Review by Commission, order

Procedure--Review by Commission, order. (a) The findings and recommended order of the Commissioner or Adjudicator shall be filed with the Commission.

(b) Any party to the proceedings may file written exceptions, supported by argument, to the findings and recommended order of the Adjudicator within 30 days after service of said findings and recommended order on such party. Copies thereof shall be served on all other parties at the same time. Any other party may file a written response to such exceptions and argument within 21 days thereafter, serving copies at the same time on all other parties. Any party shall be allowed oral argument before the Commission by requesting same at the time of filing its written exceptions or responses as hereinabove provided. If any party requests oral argument in this manner, the Commission shall schedule oral arguments to be heard before at least a majority of the members of the Commission, and shall notify all parties in writing

of the time and place for such arguments. Any other party not previously requesting oral argument shall be permitted to present such arguments at the time and place scheduled by filing a written demand therefor with the Commission not less than 10 days prior to the date set for oral arguments.

(c) The Commission, on its own motion or pursuant to the written request of any party made at the time of filing exceptions or responses as hereinabove provided, may remand a case to an Adjudicator or Commissioner for purposes of a rehearing or for hearing additional evidence in the matter. In such event, the Commission shall issue and serve on all parties a written order remanding the cause and specifying the additional evidence which shall be taken. The Adjudicator or Commissioner presiding at such rehearing or additional evidence shall set a date therefor upon due notice to all parties. After conclusion of such rehearing or additional evidence, the Adjudicator or Commissioner shall file written findings and recommendations based thereon with the Commission, serving copies at the same time on all parties in the same manner as provided in Section 8.01(c) hereof. Such findings and recommendations shall be subject to review by the Commission as provided in this Section.

(d) Following the filing of the findings and recommended order of the Adjudicator or Commissionerand any written exceptions and responses thereto, and any other proceedings provided for in this Section, the Commission shall review the record and may adopt, modify or reverse in whole or in part the findings and recommendations of the Adjudicator. The Commission shall adopt findings of fact of the Adjudicator or Commissioner contrary to the manifest weight of the evidence. The Commission shall file its written order and decision in its office and serve copies thereof on all parties together with a notification of the date when it was filed.

(e) The Commission may, at any time prior to final order of the Court in a proceeding under Section 10 or 11, upon reasonable notice, modify or set aside in whole or in part any finding or order made by it in accordance with this Section. Any such modification shall be accomplished by the filing and service of a supplemental order and decision by the Commission in the same manner as provided in subsection (d) hereof.

859. Additional powers of the commission--Appearances of witnesses--Service of process

Additional powers of the commission; appearances of witnesses; service of process. For the purpose of all hearings and investigations:

(a) The Chairperson of the Commission shall issue subpoenas on a form prescribed by the Commission, at the instance of the Commission, or of the Commissioner or Adjudicator conducting a public hearing, or at the instance of a respondent or complainant to the proceed

ings, whenever necessary to compel the attendance of a witness or to require the production for examination of any books, payrolls, records, correspondence, documents, papers or other evidence in any investigation of an unfair employment practice charge or in connection with any hearing before the Commission, or a member thereof, or an a Adjudicator. Official signed forms of subpoenas may be obtained from the Commission in accordance with rules and regulations which it may from time to time prescribe.

(b) If any witness resides outside of the State, or through illness or any other cause is unable to testify before the Commission at the hearing or investigation, his or her testimony or deposition may be taken, within or without the State, in the same manner as is provided for in the taking of depositions in civil cases in circuit courts.

(c) For good cause shown the Commission or an Adjudicator on motion may quash or modify any subpoenas, and in the case of a subpoena duces tecum, issued and served at the instance of the Commission, the Commission shall upon request pay the reasonable expense, as determined by the Commission, of producing or providing any item specified in the subpoena.

(d) In case of failure or refusal to obey a subpoena issued to any person, the Circuit Court of the county in which such person resides or has his or her principal place of business, upon petition by the Commission, and after a hearing on such petition, has jurisdiction to issue an order requiring such person to appear before the Commission, there to produce evidence, if so desired, or there to give testimony touching the matter under investigation or in question. Before petitioning the Court for such order, the Commission shall first serve notice upon such person, not less than 5 days prior thereto, stating the time and place where the petition is to be presented. Failure to obey any order issued by the Court may be punished by the Court as contempt thereof.

(e) Except as otherwise provided in this Act, complaints, orders and other process and proper papers shall be served in accordance with such rules and regulations as the Commission may from time to time prescribe. The verified return of the individual making service in accordance with this Section, and setting forth the manner of such service shall constitute proof of service. Witnesses summoned before the Commission or a member thereof shall be paid the same fees and mileage as are paid witnesses in the Circuit Courts of this State, and witnesses whose depositions are taken or the person taking the same shall severally be entitled to the same fees as are paid for like services in the Circuit Courts of this State.

860. Review under Administrative Review Act

Review under Administrative Review Act. Any complainant or respondent may apply for and obtain judicial review of an order of the Commission entered under this Act in accordance with the provisions of the "Administrative Review Act," approved May 8, 1945, as heretofore or hereafter amended (Ill. Rev. Stat., Ch.110 §264 et seq.); and the Commission in proceedings under this Section may obtain an order of Court for the enforcement of its order.

861. Judicial enforcement

Judicial enforcement. Whenever the Commission concludes that any person has violated a valid order of the Commission issued pursuant to Sections 8, 8.01 and 8.02 of this Act, and the violation and its effects are not promptly corrected, the Commission shall commence an action in the name of the People of the State of Illinois by petition, alleging the violation, attaching a copy of the order of the Commission and praying for the issuance of an order directing such person, his or her or its officers, agents, servants, successors and assigns to comply with the order of the Commission. Upon the commencement of such action the Court shall have jurisdiction of the proceedings and power to grant or refuse, in whole or in part, the relief sought or such other remedy as the Court may deem proper, provided that the Court may stay an order of the Commission in accordance with paragraph (1)(a), Section 12 of the "Administrative Review Act," pending disposition of the proceedings. The Court may punish for any violation of its order as in case of civil contempt. Actions of the Court under this Section shall take precedence over all other matters except matters of the same character.

862. Venue

Venue. The proceedings provided in Sections 10 and 11 shall be commenced in the Circuit Court in and for the county wherein the unfair employment practice which is the subject of the Commission's order was committed and shall be given precedence over all other civil cases except cases arising under the "Workmen's Compensation Act," approved July 9, 1951, as heretofore or hereafter amended or the "Worker's Occupational Diseases Act," approved July 9, 1951, as heretofore or hereafter amended.

APPENDIX

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

Affidavit

James E. Braxton, being first duly sworn, on oath deposes and states as follows:

1. That he is Executive Director of the Illinois Fair Employment Practices Commission.

2. That in said capacity he is familiar with the various records, surveys and docket summaries concerning the caseload of charges filed with and disposed of by the Commission in recent years.

3. That those sources reveal that the Commission's caseload activity for the four most recent fiscal years has been approximately as portrayed in Table I below:

TABLE I

Caseload Data

	FY 74	FY 75	FY 76	FY 77	FY 78
Charges filed during year	1668	2301	2759	2120	———
Carried over from prior year	1624	1717	2233	3077	3481
Charges disposed of during year	1575	1785	1915	1716	———

4. That Commission records reveal the following approximate breakdown by age of charges which were pending for investigation by the Commission as of the dates indicated:

TABLE II

Charges Pending Longer Than 180 Days

	As of 7/1/76	As of 1/1/78
Number of Charges Pending More Than 180 Days	1453	2901
Total Charges Pending For Investigation	3077	3572

5. That the Commission's appropriation from the State's general revenue fund over the last four fiscal years has been as follows:

TABLE III

General Revenue Fund Appropriations to Commission

(Thousands of Dollars)

FY 74	FY 75	FY 76	FY 77
830.1	950.1	921.9	1114.1

6. That Commission records reveal the following approximate breakdown, by type of discrimination alleged, of charges filed with the Commission during the last four fiscal years.

TABLE IV

Charges Filed By Type

	FY 74 %	FY 75 %	FY 76 %	FY 77 %
Race, Color	812 (48.7)	987 (42.9)	1,352 (49.2)	877 (41.4)
Sex	466 (28.0)	1,049 (45.6)	755 (27.3)	476 (22.5)
Religion	20 (1.2)	21 (.9)	47 (1.7)	28 (1.3)
National Origin/ Ancestry	167 (10.0)	145 (6.3)	248 (.9)	232 (10.9)

TABLE IV cont.

Charges Filed By Type

	FY 74	%	FY 75	%	FY 76	%	FY 77	%
Retaliation	42	(2.5)	51	(2.2)	44	(1.6)	62	(2.9)
Arrest	7	(.4)	6	(.3)	19	(.7)	6	(.3)
Handicaps	0	(.0)	0	(.0)	91	(3.2)	211	(10.0)
Military Discharge	0	(.0)	0	(.0)	0	(.0)	2	(.1)
Multiple	154	(9.2)	42	(1.8)	203	(7.3)	226	(10.6)
	1,668		2,301		2,759		2,120	

Further affiant sayeth not.

Affiant

Subscribed and Sworn to before me

this 17th day of February, 1978

NOTARY PUBLIC

Office-Supreme Court, U.S.
FILED
MAY 6 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-5950

In the Supreme Court of the United States

OCTOBER TERM, 1980

LAVERNE L. LOGAN, APPELLANT,

v.

ZIMMERMAN BRUSH COMPANY, APPELLEE.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

JOINT APPENDIX

GARY H. PALM
MARK C. WEBER
Edwin F. Mandel Legal Aid Clinic
University of Chicago Law School
6020 South University Avenue
Chicago, Illinois 60637
(312) 324-5181
Counsel for Appellant

JAY A. CANEL
Rudnick & Wolfe
30 North LaSalle Street
Suite 2800
Chicago, Illinois 60602
(312) 368-4095
Counsel for Appellee

APPEAL DOCKETED DECEMBER 27, 1980
PROBABLE JURISDICTION NOTED FEBRUARY 23, 1981

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STATE OF ILLINOIS
FAIR EMPLOYMENT PRACTICES COMMISSION

Chicago Office:
179 W. Washington
Chicago, IL 60602–312/435-6200

Springfield Office:
3 W. Old State Capitol Plaza-Myers Bld. 2nd
Springfield, IL 62701–217/782-1927

FOR OFFICE USE ONLY

Date Filed: 11/14/79
No. 1980CN0680

CHARGE OF UNFAIR EMPLOYMENT PRACTICE

I, Mr. Laverne L. Logan, 124 North Parkside Avenue, Chicago, Illinois 60644, (312) 276-3911, charge on my own behalf to have been personally aggrieved by an unfair employment practice committed by Zimmerman Brush Company, 900 West Lake Street, Chicago, Illinois 60608, (312) 829-3262, on the 9th day of November 1979 at Chicago (Cook) because of my Physical Handicap—short left leg.

The facts of the alleged unfair employment practices are:

I. On 11/9/79, I was terminated from my position of Shipping Clerk. I was hired on October 9, 1979.

II. The reason given for my termination by the Superintendent, Mr. Weber, was my performance.

III. I believe that I have been discriminated against because of my physical handicap, short left leg, in that:

A. When I was informed by the Superintendent that I was terminated because of my performance, I questioned the Foreman of the 4th Floor, Flo, since I was never warned that my work was unsatisfactory. Flo informed me that the reason the Superintendent gave him for my termination was because he had seen me setting down on several occasions.

B. Respondent was aware of my handicap and that was the reason I sat down instead of walking around like the rest of the employees when the line was full.

Mr. Laverne L. Logan, on oath or affirmation states that he is the complainant herein, that he has read the foregoing charge and knows the contents thereof, and that the same are true and correct to the best of his/her knowledge.

/s/ _____
LAVERNE L. LOGAN
Signature of Complainant

SUBSCRIBED and sworn to before me this 14th day of November 1979 at Chicago, Illinois

/s/ _____
Notary Public

CHRONOLOGICAL LIST OF RELEVANT DATES

November 14, 1979	Laverne Logan's Charge of Unfair Employment Practice filed with the Illinois Fair Employment Practices Commission
January 28, 1980	Notice of Fact Finding Conference and Questionnaire sent to Zimmerman Brush Company
March 7, 1980	Zimmerman Brush Company's Answer to Questionnaire filed with the Illinois Fair Employment Practices Commission
March 18, 1980	Fact finding conference convened; Zimmerman Brush Company's Motion to Dismiss filed
March 22, 1980	Zimmerman Brush Company's Petition for Writ of Prohibition filed with the Supreme Court of Illinois
March 25, 1980	Order entered by Supreme Court of Illinois granting leave to file Petition for Writ of Prohibition and staying proceedings before the Fair Employment Practices Commission
April 30, 1980	Laverne Logan's Second Charge of Unfair Employment Practice filed with the Fair Employment Practices Commission
May 29, 1980	Oral argument heard in the Supreme Court of Illinois
September 29, 1980	Writ of Prohibition awarded

December 27, 1980	Laverne Logan's Jurisdictional Statement docketed with the Supreme Court of United States
February 23, 1981	Probable jurisdiction noted by the Supreme Court of the United States

STATE OF ILLINOIS

Fair Employment Practices Commission

CENTRAL OFFICE: 179 WEST WASHINGTON STREET, 4TH FLOOR • CHICAGO, ILLINOIS 60602 312/793-6200
REGIONAL OFFICE: 3 WEST OLD STATE CAPITOL PLAZA, MYERS BUILDING, 2ND FLOOR
SPRINGFIELD, ILLINOIS 62701 217/782-1927

January 28, 1980

Re: Charge Number: 1980CN0680

Mr. Howard L. Mocerf, Attorney
Borovsky, Ehrlich & Kronenberg
120 South LaSalle Street—Suite 1820
Chicago, IL 60603

Complainant: Laverne L. Logan

Respondent: Zimmerman Brush Company

NOTICE OF FACT FINDING CONFERENCE

You are hereby required to appear and participate in a Fact Finding Conference scheduled for March 18, 1980, at 9:30 a.m. at 179 W. Washington, 4th Fl, Chicago. Said conference will be conducted by the Commission representative whose name and telephone number appears at the bottom of this notice.

The Fact Finding Conference is an investigative forum intended to define the issues, determine which facts are undisputed, obtain evidence, and ascertain whether there is a basis for a negotiated settlement of the charge. An attorney or a friend may accompany you to the conference. However, you may not send a substitute for yourself or bring persons whose presence has not been requested by the Commission, without first receiving express permission to do so from the Commission representative.

Preliminary to and as a necessary part of the conference, you are requested to answer any questionnaire which may be attached to this notice and return it to the Commission representative by March 10, 1980. In addition, you may submit a written statement of your position with respect to this

charge, including a proposal for settling the charge. Such information will be made a part of the file and will be considered by the Commission during the course of its investigation, except that all settlement discussions will be treated as confidential and will not be used as evidence in this or subsequent proceedings without the written consent of the parties.

The Commission encourages the parties to settle this charge prior to the Commission's determination as to whether the allegations made in this charge are supported by substantial evidence. If the parties reach a settlement, the same shall be reduced to writing, signed by the parties and submitted to the Commission for approval. If so approved, the Commission shall thereupon enter an order incorporating the terms of settlement and dismissing the charge pursuant thereto without making a finding on the merits of the charge.

All correspondence concerning this charge should refer to the charge number referred to above. Furthermore, all correspondence and/or questions should be directed to the below named Commission representative who has been assigned to conduct the Fact Finding Conference.

DOLORES NEIGHBORS
(NAME)
793-6272
TELEPHONE NUMBER

Enclosures: Copy of Charge
Questionnaire
Revised 12/78/sp

Charge No. 1980CN0680
Complainant Laverne L. Gogan
Respondent Zimmerman Brush Company

DISCHARGE/HANDICAP/QUESTIONNAIRE

NOTE: If Respondent employs fewer than 15 employees in the State of Illinois, please contact the investigator whose

name appears on the attached notice immediateiy. Do not proceed with the questionnaire until such time as you have spoken with the investigator.

1. State the full legal name and address of Respondent named herein, and describe briefly the type of business or work carried on by Respondent at this address.

2. State the name, title, and telephone number of the individual from whom further information concerning the charge may be obtained.

3. If Respondent employs 100 or more persons, please attach a copy of the most recent EEO-1 Report for the location in question.

4. Submit a copy of Respondent's discharge policy.

5. Submit a detailed explanation of discharge procedures including, but not limited to:

a. Appeal rights.

b. Availability of these procedures to employees.

c. Persons in authority to effect a discharge, either by final decision or recommendation.

d. Extent of union involvement.

e. Applicable collective bargaining agreements. (Submit Copies.)

6. Submit the following personnel data on Complainant:

a. Date of hire. (Include the employment application.)

b. Position(s) in which Complainant was employed. (If more than one, list each and the relevant dates.)

c. Copies of other personnel records relevant to the Complainant, including but not limited to:

—Work quality evaluations.
—Attendance records.
—Disciplinary records.

7. State whether Complainant was discharged. If yes, submit:

a. Date of discharge. (Include the discharge notice.)

b. Reason for discharge.

c. Statement of whether Complainant made use of any appeal rights.

d. Name and position of the person making the final decision to discharge Complainant. Attach a copy of any evaluation or investigation report relating to the discharge.

e. Names of witnesses to each event which contributed to the discharge.

8. Submit the name, title, date of hire, discharge date, and reason for discharge, of all persons terminated from employment by Respondent in the preceding twelve months. (Include discharge notices.)

9. State whether it is Respondent's policy to make periodic or other evaluations of an employee's job performance. If so, indicate by whom these evaluations are made, how often they are made and the scope of such evaluations.

10. State the basic requirements for the position which Complainant held. Indicate how Complainant was deficient in such requirements.

11. Was Complainant's handicap a factor in the dismissal? If so, explain how.

12. Was any attempt made to accommodate the Complainant's handicap by altering physical structures, modifying job duties or transferring Complainant to another position? If yes, explain and provide documentation if available.

13. Was Complainant required to undergo a physical examination prior to dismissal? If yes, who conducted the examination and what were the results?

14. List all positions open at the time of Complainant's discharge and attach a job description for each.

15. Submit a statement of Respondent's position on the instant charge. Provide any additional information Respondent feels will aid the Commission in arriving at an objective and just resolution of the issues presented herein.

ZIMMERMAN BRUSH CO.
900 West Lake Street ▪ Chicago, Illinois 60607 U.S.A.
Phone: (312) 829-3262

March 7, 1980

Fair Employment Practices Commission
179 W. Washington St.
4th Floor
Chicago, Illinois

Attention: Miss Dolores Neighbors

Re: L. Logan
#1980CN0680

Dear Miss Neighbors:

1. ZIMMERMAN BRUSH Co., 900 West Lake Street, Chicago, Illinois 60607

2. James Weber, Plant Superintendent—Telephone 829-3262

3. See Howard Mocerf—Attorney for ZIMMERMAN BRUSH CO.

4. See UNION CONTRACT PAGE 13, Section 4. Probationary Employees, Applicable to Complainant.

5. (A) Non Union Employees (Probationary) Have No Appeal Rights. as per Union Contract.

(b) Appeal Rights available to Union Employees Only.

(C) Foreman of Department, Plant Superintendent and Vice President and President of company.

(D) None

(E) None

6. See Attached.

7. See Attached.

8. See Attached

9. Probationary Employees evaluated within first 30 days if not found suitable for position, terminated as per Section 4—Page 13 Union Contract.

10. U.P.S. Shipping Clerk: Loading, Packaging, Banding and taking care of Customer Pick ups.

Couldn't handle physical requirements of job, including significant amount of walking.

11. No.

12. Complainant told Company that he could not handle the amount of walking to do the U.P.S. Shipping Clerks Job. In a good faith attempt to accomodate the complainant he was transfered to a branding line position where little or no walking was required. agreed by cp.

13. No

14. No other jobs available at time, Employee was moved to new department to try and accommodate him.

15. In a good faith attempt to accommodate the complainant he was moved to the branding line job. This is not the first time the company has tried to help handicapped personnel.

In another recent situation concerning a handicapped employee said employee was moved from a material handling position, to a machine operators position, to mechanic-set-up man. (a highly skilled job) in order to improve and make more secure his position with the company. Said employee is now fully trained and secure within his position with the company.

Other handicapped and disadvantaged people were found and employed by the company in an effort to help such individuals. You will find the company has worked closely and harmoniously with the following organizations.

The Department of Vocational Rehabilitation (Mr. Brimston)

Jobs for Vietnam Veterans (Mayors Office, Mr. Mack)

Commonwealth of Puerto Rico (Department of Labor—Mrs. Bernios)

Indian Employment Center of Chicago (Ms. Morgan)

Centro Latino, Una Puerta Aberta (Mr. Herraro)

Although we sincerely tried to help the complainant, he could not handle the physical requirements or the expertise required of either position given to him.

The company regrets being forced to terminate the complaintant but found it necessary in light of job requirements.

It may be added, that although complaintant was seen on several occasions literally sitting down on the job, this was in great part overlooked by the company. However, when it was determine that complainant was unable to do his job the company had no choice but to terminate him.

Yours very truly,

ZIMMERMAN BRUSH COMPANY

/s/ _____

JAMES WEBER

Plant Superintendent

JW/cf

BEFORE THE ILLINOIS FAIR EMPLOYMENT PRACTICES COMMISSION

Charge No. 1980 CN 0681

LAVERNE L. LOGAN, COMPLAINANT,

v.

ZIMMERMAN BRUSH COMPANY, RESPONDENT

MOTION TO DISMISS

The Respondent, ZIMMERMAN BRUSH COMPANY, by its counsel, BOROVSKY, EHRLICH & KRONENBERG, respectfully moves the Fair Employment Practices Commission to dismiss the charge in this matter because the Commission is without authority under the Fair Employment Practices Act to proceed further. In support thereof, Respondent states as follows:

1. The Claimant's charge of employment practice discrimination was filed on November 14, 1979. (A copy of the charge is attached as Exhibit A.) A fact finding conference related thereto was scheduled by the Illinois Fair Employment Practices Commission to convene on March 18, 1980, more than 120 days after the Complainant's charge was filed. (A copy of the Notice of Fact Finding Conference is attached as Exhibit B.)

2. Section 8(b), 48 S.H.A. §858(b), of the Illinois Fair Employment Practices Act, 48 S.H.A. §851 *et seq.*, unequivocally states that the Fair Employment Practices Commission (hereinafter called "FEPC" or "Commission") "shall" convene a fact finding conference within 120 days of the proper filing of a charge alleging the commission of a discriminatory employment practice. Section 8(b) of the Fair Employment Practices Act was in effect both at the time that the Complainant's charge was filed and on March

18, 1980, the date scheduled by the FEPC for the convening of the fact finding conference.

3. The requirement that the FEPC convene a fact finding conference within the 120-day period prescribed in Section 8(b) of the Fair Employment Practices Act is mandatory by its express terms. The word "shall" in Section 8(b), by definition, imposes an unequivocal and compulsory duty upon the Commission to convene a fact finding conference within the statutory 120-day period.

4. The sponsors of the bill which amended the Fair Employment Practices Act to include Section 8(b) clearly intended to impose a compulsory obligation on the FEPC to convene a fact finding conference within 120 days of the proper filing of a charge. Thus, Represesentative Dan Houlihan, sponsor of the Bill in the House, stated, "What the Bill [House Bill 2875] would do would be to provide that subsequent to the applicable time period within which an agreed [sic] party may institute a complaint with the Fair Employment Practices Commission, that the Commission *shall* convene a fact finding [conference] . . . [within] a period of a hundred and twenty days . . .". H.B. 2875, 80th G.A., Reg. Sess., 134th day at 7 (1978) (emphasis added). Senator Guidice, sponsor of the Bill in the Senate, stated, "What this bill intends to do is to *require* the Commission to convene a fact finding conference within a hundred and twenty days after charges have been filed . . .". H.B. 2875, 80th G.A., Reg. Sess., 142nd day at 13 (1978) emphasis added).

5. That the timely convening of a fact finding conference by the FEPC is a mandatory requirement is conclusively established by comparison of the language of Section 8(b) of the Fair Employment Practices Act with Section 7.102(c)(3) of the newly enacted, not yet effective, Illinois Human Rights Act. In the prospective Human Rights Act, the Illinois General Assembly has provided that fact finding conferences "may" be conducted by the Human Rights Commission, thus conferring upon that Commission the discretionary authority to convene such conferences. The General Assembly's use of the word "shall" in the Fair Em-

ployment Practices Act and its use of the word "may" under the similar provision of the prospective Human Rights Act clearly confirms that the legislature understood the 120-day period specified in Section 8(b) of the Fair Employment Practices Act to be mandatory.

6. That the FEPC must convene a fact finding conference within 120 days of the proper filing of a charge is further confirmed by recent decisions of the Illinois Supreme Court. The Court has held that where the Act requires that the FEPC "shall" take certain action within a specified period of time, the directive of the Act is mandatory and the failure of the FEPC to act within the specified time deprives the Commission of jurisdiction over the matter. *See Board of Governors v. Illinois Fair Employment Practices Commission*, 78 Ill. 2d. 143, ___ N.E.2d. ___ (1979); *Springfield-Sangamon County Regional Plan Commission v. Fair Employment Practices Commission*, 71 Ill. 2d. 61, 373 N.E.2d. 1307 (1978). Section 8(b) of the Act requires that the FEPC "shall" convene a fact finding conference within 120 days of the filing of a charge. Thus, where the FEPC fails to convene such a conference within the prescribed time period, the decisions of the Illinois Supreme Court compel the conclusion that the FEPC is deprived of jurisdiction to further pursue the matter.

7. The FEPC has failed to comply with the mandate of §858(b) of the Fair Employment Practices Act by failing to convene a fact finding conference in the instant case on or before March 13, 1980, the final day of the statutory 120-day period. The FEPC's failure to adhere to this mandatory provision of the Act vitiates the FEPC's authority to require the appearance and participation of Respondent Zimmerman Brush Company at the fact finding conference which the Commission untimely scheduled for March 18, 1980, and the FEPC's statutory jurisdiction to further pursue this matter.

WHEREFORE, for the reasons given above, Respondent Zimmerman Brush Company respectfully moves the Fair Employment Practices Commission to dismiss the dis-

criminatory employment practice charge of Laverne L. Logan filed against Respondent on November 14, 1979.

Respectfully submitted,

/s/ _____
HOWARD L. MOCERF

/s/ _____
THOMAS R. PALMER

Attorneys for Respondent
Zimmerman Brush Company

Dated: March 18, 1980

BOROVSKY, EHRLICH & KRONENBERG
120 South LaSalle Street
Suite 1820
Chicago, Illinois 60603
(312) 558-1500

STATE OF ILLINOIS

Fair Employment Practices Commission

CENTRAL OFFICE: 179 WEST WASHINGTON STREET, 4TH FLOOR • CHICAGO, ILLINOIS 60602 312/793-6200

REGIONAL OFFICE: 3 WEST OLD STATE CAPITOL PLAZA, MYERS BUILDING, 2ND FLOOR SPRINGFIELD, ILLINOIS 62701 217/782-1927

March 19, 1980

Howard L. Mocerf
Borovsky, Ehrlich & Kronenberg
120 S. LaSalle Street
Suite 1820
Chicago, Illinois 60603

Re: Laverne L. Logan v. Zimmerman Brush Co.
Charge No. 1980CN0680

Dear Mr. Mocerf:

In order for the Commission to promptly complete the investigation and make a determination on the aboved captioned charge it will be necessary to interview, Mr. Weber, Superintendent and Flo, the 4th floor Supervisor.

During the week of March 24, 1979 I will be available to conduct an on site interview with these individuals.

A recommendation on this charge will be submitted to the Commission no later than March 31, 1979, therefore if you fail to cooperate with this request it could result in a finding of Substantial Evidence.

Finally although the Fact-Finding Conference was not convened within 120 days, the Commission has jurisdiction to investigate the charge and issue an order within 180 days.

Very truly yours,

/s/_____

DOLORES NEIGHBORS
Investigator
Investigation Division
793-6272

DN:drn

IN THE SUPREME COURT OF ILLINOIS

ZIMMERMAN BRUSH COMPANY,
AN ILLINOIS CORPORATION, PETITIONER,

v.

THE ILLINOIS FAIR EMPLOYMENT PRACTICES COMMISSION, A STATE AGENCY; DOLORES NEIGHBORS, IN HER CAPACITY AS INVESTIGATOR OF SAID COMMISSION; CONNIE VILLALBA, IN HER CAPACITY AS UNIT COORDINATOR OF SAID COMMISSION; AND LAVERNE L. LOGAN, COMPLAINANT BEFORE SAID COMMISSION, RESPONDENTS.

PETITION FOR WRIT OF PROHIBITION

To the Honorable Justices of the Supreme Court of Illinois:

Your Petitioner, ZIMMERMAN BRUSH COMPANY, by its attorneys, BOROVSKY, EHRLICH & KRONENBERG, respectfully represents to this Honorable Court as follows:

1. That Petitioner is, and at all times hereinafter mentioned was, a corporation of the State of Illinois created and existing under Illinois Revised Statutes, Chapter 144, Section 1001 *et seq.*

2. That Respondent, Illinois Fair Employment Practices Commission (hereinafter the "FEPC" or "Commission") is, and at all times hereinafter mentioned was, a State administrative agency, created and existing under Illinois Revised Statutes, Chapter 48, Section 851, *et seq.*; and was, and is, charged with the duties and vested with the powers therein specified.

3. That Respondent, Dolores Neighbors, is, and at all times hereinafter mentioned was, the Investigator assigned by Respondent FEPC to conduct a fact finding conference in the matter of Laverne L. Logan and Zimmerman Brush Company, FEPC Charge Number 1980 CN 0680.

4. That Respondent, Connie Villalba, is, and at all times hereinafter mentioned was, the Unit Coordinator assigned

by Respondent FEPC to supervise the processing by the FEPC of the matter of Laverne L. Logan and Zimmerman Brush Company, FEPC Charge Number 1980 CN 0680.

5. That Respondent, Laverne L. Logan, is, and at all times hereinafter mentioned was, the Complainant in the matter of Laverne L. Logan and Zimmerman Brush Company, FEPC Charge Number 1980 CN 0680.

6. That Respondent, Laverne L. Logan, filed a charge of unfair employment practice with Respondent FEPC on November 14, 1979. This charge was designated by the FEPC as Charge Number 1980 CN 0680. A copy of said charge is attached hereto as Exhibit A and by this reference is made a part hereof.

7. That with the filing of the aforesaid charge of unfair employment practice by Respondent Laverne L. Logan on November 14, 1979, the statutory time period within which the FEPC must convene a fact finding conference commenced to run.

8. That a fact finding conference with respect to the aforementioned charge was scheduled by the FEPC to convene on March 18, 1980, a period in excess of 120 days from the filing of the charge. A copy of the Notice of Fact Finding Conference is attached hereto as Exhibit B and by this reference is incorporated as a part hereof.

9. That Section 8(b) of the Fair Employment Practices Act (hereinafter the "Act"), 48 S.H.A. §858(b), unequivocally states that the FEPC "shall" convene a fact finding conference within 120 days of the proper filing of a charge.

10. That on March 18, 1980, Petitioner, by one of its attorneys, Thomas R. Palmer, appeared at the time and place scheduled by the FEPC for the convening of the fact finding conference for the limited purpose of presenting Petitioner's motion to the FEPC to dismiss the unfair employment charge of Laverne L. Logan, asserting as grounds thereof that the FEPC lacked statutory authority to convene an untimely fact finding conference and jurisdiction to further proceed in the matter. A copy of said motion is attached hereto as Exhibit C and by this reference is made a part hereof.

11. That on March 18, 1980, Respondent FEPC, by its duly appointed and acting agents, Dolores Neighbors, Investigator, and Connie Villalba, Unit Coordinator, denied Petitioner's motion to dismiss the aforementioned charge.

12. That Respondent FEPC, despite the specific requests of one of Petititioner's attorneys, Thomas R. Palmer, has refused to set forth in writing the legal basis of its ruling denying Petitioner's motion to dismiss the aforementioned charge, but instead, has orally advised Petitioner that the FEPC is not required to conduct a fact finding conference and that in spite of its failure to timely convene such a conference, the Commission may still proceed to a determination in the matter within the 180-day period following the filing of the aforementioned charge. The affidavit of Thomas R. Palmer is attached hereto as Exhibit D and by this reference is made part hereof.

13. That the Respondent FEPC did continue, has continued and will continue to assert jurisdiction with respect to Respondent Laverne L. Logan's charge in that:

(a) On March 18, 1980, subsequent to its denial of Petitioner's motion to dismiss the aforementioned charge, Respondent FEPC met and conferred with Respondent Laverne L. Logan to solicit further information and opinions relevant to its evaluation of the merits of the charge and its issuance of a determination in the matter;

(b) On March 18, 1980, Respondent FEPC, by its duly appointed and acting agent, Dolores Neighbors, orally advised Petitioner that written requests for more information relevant to the FEPC's further processing of the charge and a request for the scheduling of a meeting with each of the two agents of Petitioner named in Respondent Laverne L. Logan's charge would be directed by the FEPC to the Petitioner and that the Petitioner's failure to satisfactorily respond to any of these requests would result in a finding by the FEPC of "substantial evidence" that an unfair employment practice had been committed by Petitioner due to Petitioner's failure to cooperate with the investigation of the charge;

(c) On March 18, 1980, Respondent FEPC, by its duly appointed and acting agent, Dolores Neighbors, further orally advised Petitioner that, subsequent to a finding by the FEPC of "substantial evidence" of the commission of an unfair employment practice for failure of Petitioner to cooperate, a complaint by the FEPC would issue against Petitioner followed by the scheduling of a conciliation conference, and that the Petitioner's failure to participate in such a conference would result in the matter being set for a full public hearing. See Exhibit D. The failure of the Petitioner to answer the FEPC's formal complaint or further participate in such public hearing would result in the entry of an order by the FEPC against Petitioner and in favor of Laverne L. Logan. The Act, §8.01(b).

14. That Respondent FEPC, and the members thereof, by themselves or through Respondents Dolores Neighbors or Connie Villalba, are without jurisdiction to proceed to a public hearing in this matter or in any way to further process the aforementioned charge for the reason that a fact finding conference was not convened within 120 days of the proper filing of the charge as mandated by Section 8(b) of the Fair Employment Practices Act, and the directives of both the Illinois General Assembly and this Honorable Court in its decisions in *Board of Governors v. Illinois Fair Employment Practices Commission*, 78 Ill. 2d. 143 (1979) and *Springfield-Sangamon County Regional Planning Commission v. Fair Employment Practices Commission*, 71 Ill. 2d. 61 (1978).

15. That Respondents FEPC, Dolores Neighbors and Connie Villalba's unlawful assertion of jurisdiction in this matter trends to bring into disrepute FEPC administrative proceedings and justice in this State. By unlawfully asserting jurisdiction, Respondents are acting in wilful disregard of the unequivocal mandate of Section 8(b) of the Fair Employment Practices Act which states that the FEPC "shall" convene a fact finding conference within 120 days of the filing of a charge and the clear directive stated by this Honorable Court in *Board of Governors* and *Springfield-Sangamon County*. These cases hold that such language

imposes a compulsory duty on the FEPC to act within the specified time and that, unless "waived" by the parties to the charge, the failure of the FEPC to act within the prescribed period deprives the Commission of jurisdiction over the matter.

16. That Petitioner did not and has not "waived" the statutory requirement that Respondent FEPC convene a fact finding conference within 120 days of the proper filing of a charge.

17. That the continued unlawful assertion of jurisdiction by Respondent FEPC with respect to FEPC Charge Number 1980 CN 0680 will cause irreparable harm and loss to Petitioner. The FEPC's decision to continue to assert jurisdiction over the Charge deprives the Petitioner of its procedural and substantive rights, and will cost the Petitioner substantial and incalculable unrecoverable costs. Thus, since the FEPC intends to proceed and is proceeding without the participation of the Petitioner, the FEPC will enter an order in favor of Respondent Logan for back pay and reinstatement. If the Petitioner participates in the FEPC proceedings, it will not only "waive" its right to object to the FEPC's assertion of jurisdiction but will also be required to divert substantial time and attention of its management personnel from operational responsibilities in order to respond to the FEPC's further investigation and, perhaps, to prepare for and attend a public hearing. Additionally, if the Petitioner participates further in the matter, it would be required to incur costs and attorney's fees which cannot be recovered from any of the Respondents.

18. That Petitioner has no adequate remedy in the premises of this matter, except by writ of prohibition issued by this Honorable Court, to prevent said FEPC from continuing to exercise jurisdiction or apparent jurisdiction in said matter.

19. That no contested question of fact is raised by the Petitioner.

WHEREFORE, your Petitioner prays that an order or rule be entered by this Honorable Court directing Respondents Fair Employment Practices Commission,

Dolores Neighbors and Connie Villalba to make answer to this Petition within a time fixed by this Honorable Court, showing cause, if any, why a writ of prohibition should not issue against them prohibiting them from assuming and exercising any further jurisdiction, whatever, in the matter of Laverne L. Logan and Zimmerman Brush Company, FEPC Charge Number 1980 CN 0680, and that upon a hearing thereon, a writ of prohibition issue commanding and directing said Commission, and Respondents Dolores Neighbors and Connie Villalba, to refrain and desist from any further assertion of jurisdiction whatever in this matter.

By:_____
HOWARD L. MOCERF

By:_____
THOMAS R. PALMER

Attorneys for Petitioner
Zimmerman Brush Company

Dated:

BOROVSKY, EHRLICH & KRONENBERG
120 South LaSalle Street
Suite 1820
Chicago, Illinois 60603
(312) 558-1500

YALE ZIMMERMAN affirms that he is the Vice President of Petitioner in the foregoing Petition; that he has read said Petition and has knowledge of the contents thereof and that the matters set out therein are true in substance and in fact.

_____
YALE ZIMMERMAN
Vice President
Zimmerman Brush Company

State of Illinois
County of Cook

On March 20, 1980, before me, the undersigned, a Notary Public in and for said State, personally appeared Yale

Zimmerman known to me to be the person whose name is subscribed to the within instrument and acknowledged that Yale Zimmerman executed and affirmed same.

Witness my hand and official seal:

_____

NOTARY PUBLIC

(Certificate of service omitted in printing.)

STATE OF ILLINOIS
OFFICE OF

CLERK OF THE SUPREME COURT
SPRINGFIELD
62706

March 25, 1980

Mr. Howard L. Mocerf
Borovsky, Ehrlich & Kronenberg
Attorneys at Law
120 S. LaSalle Street
Suite 1820
Chicago, IL 60603

In re: Zimmerman Brush Company, etc., petitioner, vs. The Illinois Fair Employment Practices Commission, a State Agency; et al., etc., respondents. No. 53199

Dear Mr. Mocerf:

We are enclosing a copy of the order entered today by the Supreme Court concerning the above entitled cause.

The summons has today issued.

Very Truly yours,

/s/_____
Clerk of the Supreme Court

CLW:jae
cc: Stuart Garbutt
Russell Grimes
Laverne L. Logan

March 25, 1980

No. 53199

Zimmerman Brush Company, an Illinois Corporation, petitioner, vs. The Illinois Fair Employment Practices Commission, a State Agency; et al., etc., respondents.

The motion by petitioner for leave to file a petition for an original writ of prohibition and for stay of proceedings is

allowed. Further proceedings in Charge Number 1980 CN 0680 are stayed pending disposition of this cause. Summons to issue. Respondents are ordered to file a response to said petition on or before April 4, 1980. Brief of petitioner to be filed on or before April 25, 1980; brief of respondents to be filed on or before May 16, 1980, and reply brief of petitioner, if any, to be filed on or before May 26, 1980. Cause to be heard at the May 1980 Term.

around like the rest of the employees when the line was full.

Mr. Laverne L. Logan, on oath or affirmation states that he is the complainant herein, that he has read the foregoing charge and knows the contents thereof, and that the same are true and correct to the best of his knowledge.

/s/ _____
SIGNATURE OF COMPLAINANT

Subscribed and sworn to before me this 10 day of May 1980
Chicago, Illinois

/s/_____
Notary Public

OPINION
SUPREME COURT
OF ILLINOIS
United States of America

State of Illinois } SS.
Supreme Court }

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eighth day of September in the year of our Lord, one thousand nine hundred and eighty, within and for the State of Illinois.

PRESENT: JOSEPH H. GOLDENHERSH,
CHIEF JUSTICE

JUSTICE ROBERT C. UNDERWOOD
JUSTICE HOWARD C. RYAN
JUSTICE THOMAS J. MORAN

TYRONE C. FAHNER ATTORNEY GENERAL
LOUIE F. DEAN, MARSHAL
ATTEST: CLELL L. WOODS, CLERK

JUSTICE DANIEL P. WARD
JUSTICE WILLIAM G. CLARK
JUSTICE THOMAS E. KLUCZYNSKI

Be It Remembered, that afterwards, to-wit, on the 29th day of September, 1980 the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

Zimmerman Brush Company, an Illinois corporation, Petitioner No. 53199 vs. The Illinois Fair Employment Practices Commission, a State Agency; et al., etc., Respondents	Prohibition

Docket No. 53199—Agenda 49—May 1980.

ZIMMERMAN BRUSH COMPANY, Petitioner, v. THE ILLINOIS FAIR EMPLOYMENT PRACTICES COMMISSION, Respondent.

MR. JUSTICE WARD delivered the opinion of the court:

On November 9, 1979, Laverne Logan was discharged from his employment at the Zimmerman Brush Company (company) in Chicago, on the ground that he was unable to perform his duties on an assembly line due to a physically handicapped left leg. On November 14, Logan filed a charge with the Illinois Fair Employment Practices Commission (Commission) claiming that he had been discriminated against because of his handicap. On January 30, 1980, the company was notified by the Commission to be present at a fact-finding conference set for March 18, 1980, in order to "define the issues, determine which facts are undisputed, obtain evidence, and ascertain whether there is a basis for a negotiated settlement of the charge." The company was also asked to complete a two-page questionnaire regarding the circumstances of Logan's discharge. The company answered the questionnaire and returned it on March 7.

On March 18 the company appeared for the sole purpose of moving to dismiss the charge on the ground that the conference was convened 125 days after Logan's charge was filed, which was beyond the 120-day period provided for in the Fair Employment Practices Act (Ill. Rev. Stat. 1979, ch. 48, par. 858(b). Since the meeting was not held within the prescribed period, the company said the Commission lost jurisdiction and should dismiss the charge. Upon the oral denial of the motion and the hearing officer's statement that the conference was to proceed, the company refused to participate and left the meeting.

On March 20 the company moved in this court for leave to file a petition for writ of prohibition under Supreme Court Rule 381(a) (73 Ill. 2d R. 381(a)). On March 25 the motion was allowed, briefs were ordered, the proceeding before the Commission was stayed, and oral argument on whether the writ should be allowed was set for June 25. On

April 30, Logan filed a second charge with the FEPC which was identical to the first. The Commission notified the company of its intention to proceed with the second charge and the company moved to stay the second proceeding pending a decision on its petition for a writ of prohibition. We allowed the motion to stay.

The controversy here concerns the interpretation to be given section 8(b) of the Fair Empoyment Practices Act, which provides:

> "(b) Within 120 days of the proper filing of a charge, the Commission shall convene a fact finding conference (unless the charge has been withdrawn or dismissed) for the purposes of obtaining evidence, identifying issues in dispute, ascertaining the positions of the parties, and exploring the possibility of a negotiated settlement of the controversy. Notice of such conference shall be given to all parties at least 10 days prior thereto and a default order may be entered against any party who fails to attend such conference without good cause shown." Ill. Rev. Stat. 1979, ch. 48, par. 858(b).

The company contends that the legislature, in providing that the Commission "shall convene" a fact-finding conference within 120 days after a charge has been filed with the Commission, intended to make mandatory the convening of a fact-finding conference within this prescribed time period. It contends further that a failure by the Commission to do so would result in an automatic dismissal of the charge. The Commission's position is that the provision in section 8(b) for convening a conference is only directory and that one may be called beyond the 120-day period. The complainant Logan states that, even if "shall convene" is deemed here to be mandatory, the automatic dismissal of his charge should not be the consequence of the Commission's failure to convene the conference within the prescribed statutory period.

The use of "shall" in a statutory provision does not of itself require that the provision be held to be mandatory rather than directory. One must consider the word within the context of the entire statute, looking particularly to the

purpose of the legislation. (See *Miller v. Department of Registration & Education* (1979), 75 Ill. 2d 76, 81; *In re Armour* (1974), 59 Ill. 2d 102, 104; *Carrigan v. Illinois Liquor Control Com.* (1960), 19 Ill. 2d 230,233.) Applying this principle we judge that the legislative direction to convene a fact-finding conference within the 120-day period is a mandatory one.

Section 8(b) was approved and became effective in September of 1978 shortly after this court interpreted the existing section 8(c), which required that the FEPC decide whether or not a complaint "shall" issue within 180 days after receipt of an employee's charge. In *Springfield-Sangamon County Regional Plan Com. v. Fair Employment Practices Com.* (1978), 71 Ill. 2d 61, this court analogized the 180-day period to a period of a statute of limitations and also noted the financial impact upon an employer who might be confronted by a complaint long after the alleged unfair employment practice. The court went on to hold that "the 180-day period prescribed in the statute was intended to ensure expeditious action on behalf of the FEPC, and must be considered mandatory." (71 Ill. 2d 61, 68.) It was also observed: "The respondents have the right to expect that the impact of such administrative orders will be minimized by compliance with the statutory time limitations." (71 Ill. 2d 61, 73.) Shortly thereafter in *Board of Governors v. Illinois Fair Employment Practices Com.* (1979), 78 Ill. 2d 143, 149, the decision in *Springfield-Sangamon* was upheld as being "clear and unequivocal," and this court issued a writ of prohibition against the Commission, which had filed a complaint more than two years after the expiration of the 180-day statutory period.

As stated, section 8(b), requiring that "the Commission shall convene a fact finding conference" within 120 days after receiving an unfair employment practices charge, was added to the Act by amendment eight months after the decision in *Springfield-Sangamon*. We consider that the legislature's use again of the term "shall" in section 8(b) indicates an intention that the prescription of a 120-day period be given a mandatory construction. This court has stated that where "previously construed terms in the unamended

sections are used in the amendment, it is generally concluded that the legislature intended to adopt the prior construction given to these terms." (*Hupp v. Gray* (1978), 73 Ill. 2d 78, 86, citing 1A Sutherland, Statutes and Statutory Construction sec. 22.35 (4th ed. 1972).) Though the question here is not identical, the principle of construction is applicable especially where, as here, the term previously construed appears in a later amendment to the same section of the statute. It is a canon of construction that the General Assembly is presumed to know how the courts have interpreted a particular statute and to have acted thoroughly and conscientiously. (See. *e.g.*, *People v. Manning* (1979), 76 Ill. 2d 235, 241. See also 2A Sutherland, Statutes and Statutory Construction sec. 57.05 (4th ed. 1973).) It is reasonable to consider that under these circumstances the legislature intended to adopt the prior construction of "shall."

The Commission would have us hold that the legislative pronouncement is but directory. It argues that the financial impact upon the employer in *Springfield-Sangamon*, when confronted with the prospect of being liable for back pay and interest over an extended period of time, was far greater than whatever impact there might have been here by a delay of five days in scheduling a conference.

We deem that this contention that the conference should be allowed to proceed beyond the 120-day period interprets *Springfield-Sangamon* too narrowly and ignores the goals underlying section 8(b). The fact-finding conference is specifically designed "for the purposes of obtaining evidence, identifying issues in dispute, ascertaining the positions of the parties, and exploring the possibility of a negotiated settlement of the controversy." (Ill. Rev. Stat. 1979, ch. 48, par. 858(b).) Before the provision was added to the Act in 1978 there was no formal opportunity for expeditiously resolving a dispute. The only indication of whether it was deemed that the employee's charge was supported by "substantial evidence" (Ill. Rev. Stat. 1979, ch. 48, par. 858(c)) would be on or before the 180th day after the filing of the charge when the Commission's decision to issue a complaint against the employer or not to issue a complaint was announced.

Under section 8(b) the interests of both employee and employer can be served in that each is given an opportunity to discuss and possibly settle the dispute without formal action being taken against the employer by the Commission. Through a conference, unnecessary costs may be avoided and the Commission permitted to devote itself to other matters. Even if a settlement is not reached at this stage, the proceeding can be importantly valuable to the Commission in that the conference not only places the Commission in a better posture to decide whether to dismiss the employee's charge, it also aids the Commission in setting up a procedural framework for the conciliatory process which follows. (See Ill. Rev. Stat. 1979, ch. 48, par. 858(c).) The public interest in an expeditious resolution of disputes which is made possible though section 8(b) is not less important than the financial considerations discussed in *Springfield-Sangamon.* Avoiding unnecessary expenditures of time and money by all parties serves to further the stated policy of the act, which is not only to protect employees from unfair employment practices but also to protect "employers, labor organizations and employment agencies from unfounded charges of discrimination." Ill. Rev. Stat. 1979, ch. 48, par. 851.

That a default order may be entered against a party failing to attend the conference not only illustrates the importance the legislature attached to this stage of the proceedings but also it supports our view that the provision for the convening of a conference within 120 days is a mandatory one. In *Tuthill v. Rendelman* (1944), 387 Ill. 321, 350, the court cited *Clark v. Quick* (1941), 377 Ill. 424, 430, where it was said: "Where terms of the statutes are peremptory and exclusive, where no discretion is reposed or where penalties are provided for its violation, the provisions of the act must be regarded as mandatory."

We cannot adopt the employee's contention that the Commission's failure to convene a fact-finding conference should not result in the automatic dismissal of the action and that the Commission should be allowed to proceed without a conference having been held. To adopt this posi-

tion would frustrate the purpose of attempting to facilitate just and expeditious resolutions of employment disputes. The fact-finding conference was clearly intended to be an integral and mandatory phase of the complaint process. Such conferences benefit the Commission, the employee and employer, and, of course, the public interest. Without a required fact-finding conference the Commission would in most instances have to proceed solely on the basis of the employee's charge. Unless the Commission would be able to obtain information regarding the charge from some independent investigation its decision of whether or not to file a complaint would hardly be an informed one.

The Commission and Logan also contend that the company waived its right to object to the Commission's decision to proceed with the conference on the 125th day and also is estopped from claiming that the Commission has lost jurisdiction over the dispute. The contention is founded upon the company's response to the Commission's questionnaire regarding the circumstances of the employee's discharge. The questionnaire was filed with the Commission on March 7, six days before the 120-day period had expired and 11 days before the date on which the conference was actually convened on March 18.

The contention must be denied. The company simply complied with the Commission's direction or request in completing the questionnaire. Had it not done so, as the company points out, it would have been responsible for delaying the proceeding. Too, it is not shown that the company was aware that the 120-day period under section 8(b) would expire before the scheduled date of the conference. We do not find a basis for estoppel or waiver. See generally *Pantle v. Industrial Com.* (1975), 61 Ill. 2d 365; *Levin v. Civil Service Com.* (1972), 52 Ill. 2d 516; *Lowenberg v. Booth* (1928), 330 Ill. 548; *Town & Country Bank v. James M. Canfield Contracting Co.* (1977), 55 Ill. App. 3d 91.

We also are not persuaded by the employee's protests that his rights to due process and equal protection were violated. The statutory scheme here was to provide, through administrative and judicial channels, a means of relief from discriminatroy employment practices. The legislature could

establish reasonable procedures to be followed upon a charge, and the observance of them here did not violate his constitutional rights.

The employee makes two other arguments. He says that the question regarding his charge against the company has been mooted because he filed a second and identical charge against the company before the 180-day statutory period within which a charge must be filed had expired. This, he argues, allows the Commission to proceed as if the first charge had never been filed. He further contends that the second charge is governed by the Illinois Human Rights Act, which became effective on July 1, 1980. (Ill. Rev. Stat., 1979 Supp., ch. 68, par. 1–101 *et seq.*). Logan directs attention to section 7–102(C)(3), which he says makes the convening of a fact-finding conference discretionary with the Commission. That section provides:

> "Upon reasonable notice to the complainant and the respondent, the Department may conduct a fact-finding conference. The fact-finding conference shall be held within 120 days of the date on which a charge has been filed unless waived by the parties in writing 10 days before the 120 day period has expired." Ill. Rev. Stat., 1979 Supp., ch. 68, par. 7–102(C)(3).

The argument ignores the principle that a statute will be given prospective application unless there is a clear expression of legislative intent that it is to be retroactively applied. (See, *e.g.*, *People ex rel. American Federation of State, County & Municipal Employees v. Walker* (1975), 61 Ill. 2d 112; *Vendo Co. v. Stoner* (1974), 58 Ill. 2d 289, *cert. denied* (1975), 420 U.S. 975, 43 L. Ed. 2d 655, 95 S. Ct. 1398; *Country Mutual Insurance Co. v. Knight* (1968), 40 Ill. 2d 423.) It is evident there is nothing in the above-quoted section to require or permit retroactive application.

Too, this controversy was not made moot by the employer's filing a second charge with the Commission. As the complainant interprets the Act, as long as the 180 days within which he may file a charge with the Commission under section 8(a) have not expired, he is entitled to file another charge. To be consistent, it would seem he would have to contend that this would be so regardless of the fact

that the Commission had dismissed an earlier charge or, as in this case, had failed to convene a fact-finding conference within 120 days, which resulted in the dismissal of the charge. To allow such interpretation, however, obviously would frustrate the design of sections 8(a) and 8(b) and, in a case such as this one, would allow the Commission, despite its failure to comply within the Act, to proceed on an identical charge after the first charge had already expired or suffered dismissal. Not only would an employer's rights be prejudiced if an employee were allowed to file a second and successive charge, but also the public interest in promoting an expeditious resolution of charges would be circumvented.

For the reasons given, the petition for writ of prohibition is allowed.

Writ awarded.

FAIR EMPLOYMENT PRACTICES ACT

AN ACT to promote the public health, welfare and safety of the People of the State of Illinois by reducing denial of equality of employment opportunity.

851. Declaraton of policy

Whereas denial of equal employment opportunity because of race, color, religion, sex, national origin, ancestry, physical or mental handicap unrelated to ability, or unfavorable discharge from military service, with consequent failure to utilize the productive capacities of individuals to the fullest extent deprives a portion of the population of the State of earnings necessary to maintain a reasonable standard of living, thereby tending to cause resort to public charity and may cause conflicts and controversies resulting in grave injury to the public safety, health and welfare:

Therefore, it is declared to be the public policy of this State that without in any way precluding any employer from selecting between persons of equal merit, ability, and capabilities, equal employment opportunity or apprenticeship opportunity without discrimination because of race, color, religion, sex, national origin, ancestry, physical or mental handicap unrelated to ability, or unfavorable discharge from military service should be protected by State law.

It is also the public policy of this State to protect employers, labor organizations and employment agencies from unfounded charges of discrimination.

852. Definitions

Definitions. When used in this Act, unless the context otherwise requires, the term:

(a) "Commission" the Fair Employment Practices Commission created by this Act.

(b) "Complainant" means any individual charging on his own behalf to have been personally aggrieved by an unfair employment practice.

(c) "Employee" includes and means any individual performing services for remuneration within this State for an employer, or who is an apprentice, or who is an applicant for

any apprenticeship; except that the term "employee" does not inlcude domestic servants in private homes, those clients who are in a vocational rehabilitation facility certified pursuant to Section 14(c) of The United States Fair Labor Standards Act, as amended, in the following categories: evaluee—a person in a diagnostic program for up to 6 months; trainee—a person in a training program used to implement the findings of the diagnostic evaluation and not engaged in productive work for up to 12 months; and work activity client—a person in a therapeutic day care program for whom work is inconsequential, individuals employed by persons who are not employers as defined by this Act, or persons employed in "agricultural labor" as that term is defined in The Unemployment Compensation Act, as now or hereafter amended; nor does the term "employee" include any elected public official or the members of his immediate personal staff or the principal administrative officers of the State of Illinois or of any political subdivision, municipal corporation or other governmental unit or agency thereof.

(d) "Employer" includes and means: (i) any person (as defined in this Section) employing 15 or more persons within this State during 20 or more calendar weeks within the calendar year of or preceding an alleged unfair employment practice; (ii) the State and any political subdivision, municipal corporation or other governmental unit or agency thereof, without regard to the number of employees. The term "employer" does not include any religious corporation, association, educational institution or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution or society of its activities.

(e) "Employment Agency" includes both public and private employment agencies and any person, and any labor organization or labor union having a hiring hall or hiring office regularly undertaking, with or without compensation, to procure opportunities to work, or to procure, recruit, refer or place employees.

(f) "Labor Organization" includes any organization, or labor union, craft union, or any voluntary unincorporated as-

sociation designed to further the cause of the rights of union labor which is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms, or conditions of employment, or apprenticeships or applications for apprenticeships, or of other mutual aid or protection in connection with employment, including apprenticeships or applications for apprenticeships.

(g) "Person" includes one or more individuals, partnerships, associations or organizations, labor organizations, labor unions, or union labor associations, corporations, legal representatives, trustees in bankruptcy or receivers.

(h) "Unfair Employment Practices" includes only those practices specified in Section 3 of this Act.

(i) "Unfavorable Discharge" includes discharges from the Armed Forces of the United States, their Reserve components or any National Guard or Naval Militia which are classified as RE–3 or the equivalent thereof, but does not include those characterized as RE–4 or "Dishonorable".

853. Unfair employment practices.

Unfair employment practices. It is an unfair employment practice:

(a) For any employer, because of race, color, religion, sex, national origin, ancestry or physical or mental handicap unrelated to ability of an individual, or an unfavorable discharge from military service, to refuse to hire, to segregate, or otherwise to discriminate against such individual with respect to hire, selection and training for apprenticeship in any trade or craft, tenure, terms or conditions of employment; or

(b) For any employment agency to fail or refuse to classify properly, accept applications and register for employment referral or apprenticeship referral, refer for employment, refer for apprenticeship, or otherwise to discriminate against any individual because of his race, color, religion, sex, national origin, ancestry, physical or mental handicap unrelated to ability, or unfavorable discharge from military service, or to accept from any person any job order, requisition or request for referral of applicants for employment or

apprenticeship which makes, or has the effect of making, race, color, religion, sex, national origin, ancestry or physical or mental handicap unrelated to ability a condition of referral, except for a bona fide occupational qualification; or

(c) For any labor organization because of the race, color, religion, sex, national origin, ancestry, physical or mental handicap unrelated to ability, or unfavorable discharge from military service, military service, of any person to discriminate against such person, or to limit, segregate or classify its membership with respect to such person, or to limit such person's employment opportunities, such person's selection and training for apprenticeship in any trade or craft, or otherwise to take, or fail to take, any action which affects adversely such person's status as an employee or as an applicant for employment or as an apprentice, or as an applicant for apprenticeships, or such person's wages, tenure, hours of employment or apprenticeships conditions; or

(d) For any employer, employment agency or labor organization to discriminate against any person because he or she, reasonably and in good faith, has opposed any practice forbidden in this Act, or because he or she, reasonably and in good faith, has made a charge, testified or assisted in any investigation, proceeding or hearing under this Act; or

(e) For any employer, employment agency or labor organization to inquire on a written application whether a job applicant has ever been arrested; or

(f) For any person to compel or coerce any person to engage in any of the acts declared by this Act to be unfair employment practices.

Nothing in this Act shall preclude an employer from hiring or selecting between persons for (1) any reason except for the unfair employment practices specifically prohibited by this Act, (2) a bona fide occupational qualification or (3) "dishonorable" discharge from military service.

Nothing in this Act shall preclude the giving of preferential treatment to veterans by employers, employment agencies, labor organizations or other persons as required by law or regulation of the United States or of the State of Illinois.

Notwithstanding those provisions of paragraphs (a), (b), and (c) relating to unfavorable discharge from military service, those provisions do not apply to financial institutions where the requirements of a Federal Law or a regulation of the Federal Government or an agency thereof applicable to such institution is inconsistent; nor do those provisions apply to positions of employment in which fiduciary responsibilities are exercised. The commission shall adopt regulations defining positions in which fiduciary responsibilities are exercised.

Nor shall anything in this Act preclude any employer from giving or acting upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, national origin, ancestry, physical or mental handicap unrelated to ability, or discharge from military service.

854. Public contracts

Public contracts. Every contract to which the State, any of its political subdivisions or any municipal corporation is a party shall be conditioned upon the requirement that the supplier of materials or services or the contractor and his subcontractors, and all labor organizations furnishing skilled, unskilled, and craft union skilled labor, or who may perform any such labor or services, as the case may be, shall not commit an unfair employment practice in this State as defined in this Act, and shall take affirmative action to insure that no unfair employment practice is committed. To the full extent to which the State may have authority with respect to such contracts, this Section shall be applicable.

854A. Rules and regulations.

Rules and regulations. The Commission shall have the authority to issue rules and regulations, conduct investigations, hold hearings and issue orders based thereon for the purposes of enforcement and administration of Section 4 of this Act and rules and regulations adopted thereunder. All rules and regulations adopted under this Section shall be consistent with Section 4.

No contract shall be awarded by the State to any employer found by the Commission to have violated its rules and regulations until the Commission shall certify that the violation has ceased. For each violation that occurs there may be deducted from the amount payable to the contractor by the State of Illinois a penalty of $5 for each calendar day that the violation persists. Further, the State, any of its political subdivisions or any municipal corporation may avoid any such contract at its option and it may sue and shall recover the profits earned on such contract.

855. Illinois Fair Employment Practices Commission

Illinois Fair Employment Practices Commission. (a) The Fair Employment Practices Commission is created, to consist of 5 members, all of whom shall be bona fide residents of Illinois for 5 years last past, appointed by the Governor with the advice and consent of the Senate, no more than 3 of whom shall be of the same political party and one of whom shall be designated by the Governor as Chairperson. If the Senate is not in session at the time this Act takes effect, the Governor shall make temporary appointments as in the case of a vacancy with the advice and consent of an interim committee composed of 3 members of the Senate appointed by the President thereof and 3 members of the House of Representatives appointed by the Speaker thereof. Appointments to the committee shall be made during the month of June of each odd numbered year. Members shall serve until July 1 of the succeeding odd numbered year and until their successors are appointed and qualified or until termination of their legislative service whichever first occurs. Vacancies shall be filed for the unexpired term in the same manner as original appointments. All appointments shall be in writing and filed with the Secretary of State as a public record.

(b) Of the commission members first appointed, 2 shall be appointed for a term of 2 years each, and 3 (including the chairperson) shall be appointed for a term of 4 years each, commencing the 3rd Monday in January, 1961. Thereafter, each member shall serve for a term of 4 years and until his successor is appointed and qualified; except that any mem-

ber chosen to fill a vacancy occurring otherwise than by expiration of the term shall be appointed only for the unexpired term of the member whom he shall succeed and until his successor is appointed and qualified. In the event of a vacancy in office during the recess of the Senate, the Governor shall make a temporary appointment until the next meeting of the Senate. Such temporary appointment is subject to the advice and consent of the interim committee provided for in this Section.

(c) A single vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission. A majority of the members of the Commission then in office shall constitute a quorum.

(d) The Chairperson of the Commission shall be compensated at the rate of $10,000 per year until July 1, 1979; $11,000 from July 1, 1979 to July 1, 1980; $11,700 from July 1, 1980 to July 1, 1981, and $12,500 per year thereafter during his service as Chairperson, and each other member shall be compensated at the rate of $7,500 per year until July 1, 1979; $8,200 from July 1, 1979 to July 1, 1980; $8,700 from July 1, 1980 to July 1, 1981; $9,300 from July 1, 1981 to July 1, 1982, and $10,000 per year thereafter. In addition, all members of the Commission shall be reimbursed for expenses actually and necessarily incurred by them in the performance of their duties.

856. Powers and duties of the Commission

Powers and duties of the Commission. In addition to other powers and duties prescribed in this Act, the Commission shall have the powers and duties enumerated in Sections 6.01 through 6.08.

856.01. Meetings and functions

To meet and function at any place within the State.

856.02. Offices

To establish and maintain offices in Springfield and Chicago.

856.03. Executive director, technical advisors and employees.

To select and fix the compensation of an executive director, technical advisors and such other employees as it may deem necessary.

856.04. Hearing examiners

To select and fix the compensation of Hearing Examiners, who shall be attorneys duly licensed to practice law in this State.

856.05 Rules and regulations

To adopt, promulgate, amend and rescind rules and regulations not inconsistent with the provisions of this Act.

856.06. Posting of notices

To adopt, promulgate, amend and rescind regulations of general and uniform applicability, requiring the posting of notices by employers, employment agencies and labor organizations, apprising persons of their rights under the Act and of the coverage of such employers, employment agencies and labor organizations by the Act.

856.07. Charges—Receiving and investigation

To issue, receive, investigate and determine charges filed with it in conformity with this Act.

856.08. Reports

To report to the Governor and the General Assembly at the beginning of each General Assembly and upon request.

857. Educational program

Educational program. For the purpose of promoting equal employment opportunity, regardless of race, color, religion, sex, national origin, ancestry or physical or mental handicap unrelated to ability, and to create and to maintain better community understanding, the Commission may issue such publications, conduct such research, and make such surveys as in the judgment of the Commission will tend to promote equality of employment opportunity, including apprenticeship, regardless of race, color, religion, sex, national origin, ancestry or physical or mental handicap unrelated to ability.

858. Procedure—Charge, investigation, conference, settlement and adjustment

Procedure—Charge, investigation, conference, settlement and adjustment. (a) Whenever within 180 days after the date that an unfair employment practice allegedly has been committed, a charge in writing under oath or affirmation is filed with the Commission by a complainant or by the Commission upon a vote of at least 3 members and in such detail as to substantially apprise any party properly concerned as to the time, place and facts with respect to such alleged unfair employment practice, that any employer, labor organization, employment agency, or person, hereinafter referred to as a respondent, has committed such unfair employment practice, the Commission shall promptly serve a copy of the charge within 10 days on the respondent and thereafter shall institute an investigation by its employees to ascertain the facts relating to such alleged unfair employment practice.

(b) Within 120 days of the proper filing of a charge, the Commission shall convene a fact finding conference (unless the charge has been withdrawn or dismissed) for the purposes of obtaining evidence, identifying issues in dispute, ascertaining the positions of the parties, and exploring the possibility of a negotiated settlement of the controversy. Notice of such conference shall be given to all parties at least 10 days prior thereto and default order may be entered against any party who fails to attend such conference without good cause shown.

(c) If it is determined by the Commission, after such investigation, that there is not substantial evidence that the alleged unfair employment practice has been committed, the charge shall be dismissed; otherwise, a Commissioner or an attorney licensed to practice in Illinois, designated by the Commission, shall endeavor to eliminate the effect thereof and prevent repetition thereof by means of conference and conciliation. The complainant and respondent shall be notified of the time and place of the conference by registered or certified mail at least 10 days prior thereto and either or both parties shall appear at such conference or conciliation in person or by attorney. The place fixed shall be within 35 miles of the place where the unfair practice is alleged to have been committed. What occurs in the

conference or conciliation meeting shall not be disclosed by the Commission unless the complainant and respondent agree in writing that such disclosure be made. When a settlement is effectuated in conference and conciliation conducted by a Commissioner or attorney, the terms of settlement and adjustment shall be subject to the approval of the Commission. The Commission shall notify the complainant and the respondent of the disposition of every charge filed and the terms of any settlement, adjustment or dismissal thereof. Any member of the Commission who takes part in an investigation shall thereby be disqualified to hear any evidence on the cause in question. Except as provided in this Section, the manner and form of filing charges shall be in accordance with such rules and regulations as the Commission shall from time to time prescribe. If a settlement is effectuated, and the terms thereof are approved by the Commission, then the Commission shall prepare written terms of settlement and adjustment and have the complainant and respondent agree to them in writing. The Commission shall then enter upon all parties an order in accord with the executed written terms of settlement and adjustment. If the Commission determines after an investigation that there is substantial evidence that the respondent has violated the terms of settlement and adjustment and the order entered pursuant thereto, the Commission may either commence an action pursuant to Section 11 of this Act, or issue a written complaint and order a public hearing on such alleged violation, and, finding that such alleged violation has occured, may then order such remedies as may be necessary to correct the violation. If the Commission finds that no violation has occured it shall dismiss the complaint. If terms of settlement and adjustment not approved by the Commission are entered into by a complainant and respondent, the Commission need not enter an order in accord therewith and may terminate further proceedings in the case. The Commission may dismiss a charge if, in conference and conciliation, it is established to the satisfaction of the Commission that the respondent has taken steps to eliminate the effects of the unfair employment practice charged and pre-

vent the repetition thereof, or if, in conference and conciliation, the respondent offers and complainant declines to accept terms of settlement and adjustment which the Commission finds are sufficient to eliminate the effects of the unfair employment practice charged and prevent the repetition thereof.

(d) The Commission shall, within 180 days after the expiration of the 120 day period specified in paragraph (b), or within any extension of the 180 day period agreed to in writing by all parties and approved by a member of the Commission, either issue and serve a complaint in the manner and form set forth in Section 8.01 or shall order that no complaint be issued. Any such order shall be duly served upon both the complainant and respondent.

858.01. Procedure—Complaint, answer, hearing and order

Procedure—Complaint, answer, hearing and order. (a) In case of failure to settle or adjust any such charge by conference and conciliation in accordance with Section 8 of this Act, the Commission shall cause to be issued and served upon such respondent a written complaint, under oath or affirmation, stating the charge of unfair employment practice substantially as alleged in the charge theretofore filed with the Commission as here inbefore provided in Section 8 of this Act and the relief sought on behalf of the person aggrieved and containing a notice of public hearing before a Commissioner or a duly appointed Adjudicator at a place therein fixed, to be held not less than 30 nor more than 90 days after the service of such complaint. The place fixed shall be within 100 miles of the place where the unfair employment practice is alleged to have been committed.

(b) Any complaint may be amended under oath by leave of the Commissioner or Adjudicator conducting the public hearing, for good cause shown, upon reasonable notice to all interested parties at any time prior to the issuance of an order based thereon. A motion that the complaint be amended to conform to the evidence, made prior to the close of the public hearing, may be addressed orally on the record to the Commissioner or Adjudicator conducting the

public hearing and, if such a motion is made, it shall be granted for good and sufficient cause. The respondent shall file an answer under oath or affirmation to the original or amended complaint within 30 days of the date of service thereof, but the Commissioner or Adjudicator conducting the public hearing may, for good cause shown, grant further time for the filing of an answer. In the event that the respondent files a motion to dismiss the complaint within 30 days and the motion is denied by the Commissioner or Adjudicator conducting the public hearing, the time for filing the answer shall be within 15 days of date of denial of the motion. Any allegation in the complaint which is not denied or admitted in the answer is deemed admitted unless the respondent states in the answer that he is without sufficient knowledge or information to form a belief with respect to such allegation. The failure to file an answer is deemed to constitute an admission of the allegations contained in the complaint. The respondent has the right to amend his answer upon leave of the Commissioner or Adjudicator conducting the public hearing, for good cause shown. Both the complainant and the respondent may appear at the hearing and examine and cross-examine witnesses.

The testimony taken at the hearing shall be under oath or affirmation and a transcript thereof made and filed in the office of the Commission. The testimony taken at the hearing is subject to the same rules of evidence that apply in courts of this State in civil cases.

(c) When all the testimony has been taken, the Commissioner or Adjudicator shall determine whether the respondent has engaged in or is engaging in the unfair employment practice with respect to the person aggrieved as charged in the complaint. A determination sustaining a complaint shall be based upon a preponderance of the evidence. The Commissioner or Adjudicator than shall state his recommendations in writing and, if he finds against the respondent, shall issue and cause to be served on such respondent and the complainant a recommended order requiring such respondent to cease and desist from the unfair employment practice complained of, and to take such

further affirmative or other actions with respect to the person aggrieved, including but not limited to reinstatement of hiring, back pay, costs, and reasonable attorney fees where appropriate, as will eliminate the effect of the practice complained of. An award of back pay shall not be made for any period more than two years prior to the filing of the charge. If, upon all the evidence, the Commissioner or Adjudicator finds that a respondent charged in the complaint or that a preponderance of the evidence does not sustain the complaint, he shall state his findings of fact and shall issue and cause to be served on the respondent and the complainant a recommended order dismissing the complaint. Such a recommendation order dismissing the complaint may include an award of reasonable attorney fees in favor of the respondent if it is determined that the complaint was frivolous or unreasonable or that the complainant continued to litigate after it clearly became so.

858.01a. Actions—Injunctions—Limitation

In the case of any charge of an unfair employment practice which has been properly filed with the Commission prior to March 30, 1978, which has not been settled or adjusted by conference and conciliation under Section 8, and which within 180 days thereafter has not been the subject of a complaint issued by the Commission or an order that no complaint be issued, the person filing the charge may seek appropriate injunctive or other relief by filing an action in the circuit court of the county where the alleged unfair employment practice occurred, and if the person prevails in such action the court may award such person costs and reasonable attorneys' fees. The Commission shall notify all such persons by registered mail of their right to seek such relief and any such action must be initiated in the circuit court within 2 years of the receipt of such notice, notwithstanding any other statute of limitations imposed on such actions.

858.02. Procedure—Review by Commission, order

Procedure—Review by Commission, order. (a) The findings and recommended order of the Commissioner or Adjudicator shall be filed with the Commission.

(b) Any party to the proceedings may file written exceptions, supported by argument, to the findings and recommended order of the Adjudicator within 30 days after service of said findings and recommended order on such party. Copies thereof shall be served on all other parties at the same time. Any other party may file a written response to such exceptions and argument within 21 days thereafter, serving copies at the same time on all other parties. Any party shall be allowed oral argument before the Commission by requesting same at the time of filing its written exceptions or responses as hereinabove provided. If any party requests oral argument in this manner, the Commission shall schedule oral arguments to be heard before at least a majority of the members of the Commission, and shall notify all parties in writing of the time and place for such arguments. Any other party not previously requesting oral argument shall be permitted to present such arguments at the time and place scheduled by filing a written demand therefore with the Commission not less than 10 days prior to the date set for oral arguments.

(c) The Commission, on its own motion or pursuant to the written request of any party made at the time of filing exceptions or responses as hereinabove provided, may remand a case to an Adjudicator or Commissioner for purposes of a rehearing or for hearing additional evidence in the matter. In such event, the Commission shall issue and serve on all parties a written order remanding the cause and specifying the additional evidence which shall be taken. The Adjudicator or Commissioner presiding at such rehearing or additional evidence shall set a date therefore upon due notice to all parties. After conclusion of such rehearing or additional evidence, the Adjudicator or Commissioner shall file written findings and recommendations based thereon with the Commission, serving copies at the same time on all parties in the same manner as provided in Section 8.01(c) hereof. Such findings and recommendations shall be subject to review by the Commission as provided in this Section.

(d) Following the filing of the findings and recommended order of the Adjudicator or Commissioner and any

written exceptions and responses thereto, and any other proceedings provided for in this Section, the Commission shall review the record and may adopt, modify or reverse in whole or in part the findings and recommendations of the Adjudicator. The Commission shall adopt findings of fact of the Adjudicator or Commissioner contrary to the manifest weight of the evidence. The Commission shall file its written order and decision in its office and serve copies thereof on all parties together with a notification of the date when it was filed.

(e) The Commission may, at any time prior to final order of the Court in a proceeding under Section 10 or 11, upon reasonable notice, modify or set aside in whole or in part any finding or order made by it in accordance with this Section. Any such modification shall be accomplished by the filing and service of a supplemental order and decision by the Commission in the same manner as provided in subsection (d) hereof.

859. Additional powers of the commission—Appearances of witnesses—Service of process

Additional powers of the commission; appearances of witnesses; service of process. For the purpose of all hearings and investigations:

(a) The Chairperson of the Commission shall issue subpoenas on a form prescribed by the Commission, at the instance of the Commission, or of the Commissioner or Adjudicator conducting a public hearing, or at the instance of a respondent or complainant to the proceedings, whenever necessary to compel the attendance of a witness or to require the production for examination of any books, payrolls, records, correspondence, documents, papers or other evidence in any investigation of an unfair employment practice charge or in connection with any hearing before the Commission, or a member thereof, or an Adjudicator. Official signed forms of subpoenas may be obtained from the Commission in accordance with rules and regulations which it may from time to time prescribe.

(b) If any witness resides outside of the State, or through illness or any other cause is unable to testify be-

fore the Comission at the hearing or investigation, his or her testimony or deposition may be taken, within or without the State, in the same manner as is provided for in the taking of depositions in civil cases in circuit courts.

(c) For good cause shown the Commission or an Adjudicator on motion may quash or modify any subpoenas, and in the case of a subpoena duces tecum, issued and served at the instance of the Commission, the Commission shall upon request pay the reasonable expense, as determined by the Commission, of producing or providing any item specified in the subpoena.

(d) In case of failure or refusal to obey a subpoena issued to any person, the Circuit Court of the county in which such person resides or has his or her principal place of business, upon petition by the Commission, and after a hearing on such petition, has jurisdiction to issue an order requiring such person to appear before the Commission, there to produce evidence, if so desired, or there to give testimony touching the matter under investigation or in question. Before petitioning the Court for such order, the Commission shall first serve notice upon such person, not less than 5 days prior thereto, stating the time and place where the petition is to be presented. Failure to obey any order issued by the Court may be punished by the Court as contempt thereof.

(e) Except as otherwise provided in this Act, complaints, orders and other process and proper papers shall be served in accordance with such rules and regulations as the Commission may from time to time prescribe. The verified return of the individual making service in accordance with this Section, and setting forth the manner of such service shall constitute proof of service. Witnesses summoned before the Commission or a member thereof shall be paid the same fees and mileage as are paid witnesses in the Circuit Courts of this State, and witnesses whose depositions are taken or the person taking the same shall severally be entitled to the same fees as are paid for like services in the Circuit Courts of this State.

860. Review under Administrative Review Act

Review under Administrative Review Act. Any complainant or respondent may apply for and obtain judicial review of an order of the Commission entered under this Act in accordance with the provisions of the "Administrative Review Act," approved May 8, 1945, as heretofore or hereafter amended (Ill. Rev. Stat., Ch.110 §264 et seq.); and the Commission in proceedings under this Section may obtain an order of Court for the enforecment of its order.

861. Judicial enforcement

Judicial enforcement. Whenever the Commission concludes that any person has violated a valid order of the Commission issued pursuant to Sections 8, 8.01 and 8.02 of this Act, and the violation and its effects are not promptly corrected, the Commission shall commence an action in the name of the People of the State of Illinois by petition, alleging the violation, attaching a copy of the order of the Commission and praying for the issuance of an order directing such person, his or her or its officers, agents, servants, successors and assigns to comply with the order of the Commission. Upon the commencement of such action the Court shall have jurisdiction of the proceedings and power to grant or refuse, in whole or in part, the relief sought or such other remedy as the Court may deem proper, provided that the Court may stay an order of the Commission in accordance with paragraph (1)(a), Section 12 of the "Administrative Review Act," pending disposition of the proceedings. The Court may punish for any violation of its order as in case of civil contempt. Actions of the Court under this Section shall take precedence over all other matters except matters of the same character.

862. Venue

Venue. The proceedings provided in Sections 10 and 11 shall be commenced in the Circuit Court in and for the county wherein the unfair employment practice which is the subject of the Commission's order was committed and shall be given precedence over all other civil cases except cases arising under the "Workmen's Compensation Act," approved July 9, 1951, as heretofore or hereafter amended

or the "Worker's Occupational Diseases Act," approved July 9, 1951, as heretofore or hereafter amended.

863. Service of process or notice—Sufficiency

For the purposes of this Act, summonses, notices or writs served upon any officer of any labor organization shall be sufficient to acquire jurisdiction against such labor organization, or labor union, or voluntary unincorporated union association, and all of its officers, members and representatives.

864. Operative date

This Act shall apply to all unfair employment practices occuring on or after July 1, 1961.

865. Separability

Separability. If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of this Act or the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby.

866. Short title

Short Title. This Act shall be known and may be cited as the "Fair Employment Practices Act."

367. Utilization of agency and employees by Federal Equal Employment Opportunity Commission—Agreements with federal agencies

The Commission may in its discretion, for the purpose of carrying out its functions, permit the utilization of its agency and employees by the Federal Equal Employment Opportunity Commission in the investigation of charges over which the Illinois Fair Employment Practices Commission has jurisdiction. The Commission shall be authorized to be reimbursed by the Federal Government for the reasonable value of such services rendered.

In order to effect cooperative undertakings in the reduction of unfair employment practices, the Commission has the power and authority for and on behalf of the State to

make contractual agreements, within the scope and authority of this Act, with any agency of the Federal Government, and such agreements may include provisions under which the Federal Equal Employment Opportunity Commission shall refrain from processing a charge in Illinois in any cases or class of cases specified in such agreements.

In the Supreme Court of the United States

No. 80-5950

LAVERNE L. LOGAN, APPELLANT,

v.

ZIMMERMAN BRUSH COMPANY

APPEAL from the Supreme Court of Illinois.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probably jurisdiction is noted. The motion of appellant for leave to proceed *in forma pauperis* is granted.

FEBRUARY 23, 1981

Office-Supreme Court, U.S.
FILED
JAN 26 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-5950

In the
Supreme Court of the United States
OCTOBER TERM, 1980

LAVERNE L. LOGAN, *Appellant,*

vs.

ZIMMERMAN BRUSH COMPANY, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

MOTION TO DISMISS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-5950

LAVERNE L. LOGAN, *Appellant,*

vs.

ZIMMERMAN BRUSH COMPANY, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

MOTION TO DISMISS

Section 8(b) of Illinois' Fair Employment Practices Act (FEPA) provides: "Within 120 days of the proper filing of a charge, the Commission shall convene a fact finding conference . . . ." Ill.Rev.Stat. ch. 48 §858(b) (1979). In this case, through no fault of Laverne L. Logan or Zimmerman Brush Company, the Commission did not convene a hearing until the 125th day. Relying on its prior decision that section 8(c) of the same Act required the Commission to decide whether or not to issue a complaint against an employer within 180 days, the Illinois Supreme Court held that a conference within 120 days was a mandatory prerequisite to any FEPA claim. It said:

> "The public interest in an expeditious resolution of disputes which is made possible though section 8(b) is not less important than the financial considerations discussed in *Springfield-Sangamon*. Avoiding unnecessary expenditures of time and money by all parties serves to further the stated policy of the Act, which is not only to protect employees from unfair employment practices but also to protect 'employers, labor organizations and employment agencies from unfounded charges of discrimination.' Ill.Rev.Stat. 1979, ch. 48, par. 851."[1]

Laverne L. Logan made due process and equal protection arguments in the Illinois Supreme Court. Rejecting those arguments, the Court held:

> "We also are not persuaded by the employee's protests that his rights to due process and equal protection were violated. The statutory scheme here was to provide, through administrative and judicial channels, a means of relief from discriminatory employment practices. The legislature could establish reasonable procedures to be followed upon a charge, and the observance of them here did not violate his constitutional rights."[2]

This Court has recently reaffirmed that "where a state law does not impair a right or liberty protected by the Constitution, there is no occasion to depart from 'the settled mode of constitutional analysis of legislat[ion] . . . involving questions of economic and social policy.' " *City of Mobile* v. *Bolden*, —— U.S. ——, ——, 100 S.Ct. 1490, 1505 (1980), *citing San Antonio Ind. School District* v. *Rodriguez*, 411 U.S. 1, 33 (1973); *see also Lindsey* v. *Normet*, 405 U.S. 56 (1972). The Illinois FEPA as con-

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[1] Appellant's Appendix A at 5a-6a.

[2] Appellant's Appendix A at 7a.

strued by the Illinois Supreme Court protects the rights of employers as well as employees[3] and in so doing constitutes a reasonable exercise of the Illinois Legislature's power. Here, as in *Martinez* v. *California*, 444 U.S. 277, 282 (1980), "the State's interest in fashioning its own rules of . . . law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." Illinois' FEPA 120-day conference requirement applies equally to all claimants, is rationally related to the State's purposes, and deprives Laverne L. Logan of no federal constitutional right.

Zimmerman Brush Company therefore prays that Laverne L. Logan's appeal be dismissed on the ground that it presents no substantial federal question and because the judgment of the Illinois Supreme Court rests on an adequate non-federal basis.

Respectfully submitted,

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[3] In its earlier decision relating to the 180-day period, the Illinois Supreme Court expressed concern over the ". . . financial impact upon the employer who might be confronted by a complaint long after the alleged unfair employment practice." Appellant's Appendix A at 4a.

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No. 80-5950

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LAVERNE L. LOGAN, *Appellant,*

v.

ZIMMERMAN BRUSH COMPANY, *Appellee.*

On Appeal From The Illinois Supreme Court

BRIEF FOR APPELLANT

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QUESTIONS PRESENTED

1. Does it violate due process to terminate an employment discrimination charge without notice and a decision based upon either the strength of the charge or the diligence of the charging party, when the sole basis for the termination is that an administrative investigator negligently failed to convene a fact finding conference within the statutory period?

2. Does it violate the equal protection rationality standard to terminate those charges of employment discrimination in which an administrative investigator, prior to any evaluation of the merits of the charge, fails to convene a timely fact finding conference, when other charges receive a decision on the merits and judicial review?

LIST OF PARTIES

Laverne L. Logan, Appellant.

Zimmerman Brush Company, Appellee.

The Illinois Human Rights Commission, as successor to the Illinois Fair Employment Practices Commission, Appellee.

Delores Neighbors, Investigator of said Commission, Appellee.

Connie Villaba, Unit Coordinator of said Commission, Appellee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-5950

LAVERNE L. LOGAN, *Appellant,*

v.

ZIMMERMAN BRUSH COMPANY, *Appellee.*

On Appeal From The Illinois Supreme Court

BRIEF FOR APPELLANT

OPINION BELOW

The opinion of the Supreme Court of Illinois is reported at 82 Ill.2d 99, 411 N.E.2d 277 (1980) (J.A. 28-36).

JURISDICTION

The judgment of the Supreme Court of Illinois, granting the original writ of prohibition and terminating appellant's ac-

tion before the Illinois Fair Employment Practices Commission was entered on September 29, 1980 (J.A. 28).

The notice of appeal to this Court was duly filed in the Supreme Court of Illinois on December 22, 1980. The appeal was docketed December 27, 1980. The United States Supreme Court noted probable jurisdiction on February 23, 1981.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 1, §19, of the Illinois Constitution provides in pertinent part:

> All persons with a physical or mental handicap . . . shall be free from discrimination unrelated to ability in the hiring and promotion practices of any employer.

The Illinois Fair Employment Practices Act, Ill. Rev. Stat. ch. 48, §851 *et seq.* (1979) (repealed by and reenacted as the Illinois Human Rights Act, Ill. Rev. Stat. ch. 68, §1-101 *et seq.*, effective July 1, 1980), is set out in the Joint Appendix (J.A. 37-55).

Pertinent Sections of the Rules and Regulations of the Fair Employment Practices Commission are set out in the Appendix to this Brief at 57.

STATEMENT OF THE CASE

On September 29, 1980, the Illinois Supreme Court granted appellee Zimmerman Brush Co. ("the Company") a writ of prohibition barring the Illinois Fair Employment Practices Commission ("the Commission") from ever reaching a decision on the merits of appellant Laverne Logan's charge of employment discrimination under the Illinois Fair Employment Practices Act, Ill. Rev. Stat. ch. 48, §851 *et seq.* (1979), (J.A. 37-55), ("the FEPA"). Although Mr. Logan had complied with all procedural requirements in a timely fashion, his claim was terminated because the Commission had failed to perform its statutory duty of convening a fact finding conference within 120 days of the filing of the charge.

Mr. Logan filed his charge *pro se* with the Commission on November 14, 1979 alleging that the Company had discriminated against him because of his physical handicap, a short left leg. Section 853(a) of the FEPA provides that it is an unfair employment practice to discriminate in the conditions of employment against an individual because of a physical handicap unrelated to ability.

Section 858(a) of the FEPA requires that a person alleging an unfair employment practice file a charge with the Commission within 180 days of the date of the occurrence of the alleged unfair practice (J.A. 45). It is then the Commission's responsibility to undertake an investigation to ascertain the facts relating to the alleged unfair employment practice. If the Commission finds "substantial evidence" supporting the charge, it issues a complaint. Ill. Rev. Stat. ch- 48, §858(c) (1979) (J.A. 45-47). If the Commission does not find substantial evidence, a Notice of Dismissal is sent to the complainant. The complainant may object to dismissal of the charge and obtain consideration of the matter by the full Commission, by serving a demand therefor upon the Commission within 30 days of the date of Notice. Fair Employment Practices Commission, Rules and Regulations, §§4.5, 4.7, 5.7 (1979), Appendix to this Brief at 57. If the full Commission finds "no substantial evidence" and dismisses the charge, the victim of

the discrimination can seek judicial review of the Commission's action. Ill. Rev. Stat. ch. 48, §860 (1979) (J.A. 53). The Commission has 300 days from the date the charge was filed to complete its investigation and either dismiss the charge or issue a complaint. Ill. Rev. Stat. ch. 48, §858(8)(d)(1979) (J.A. 50-51).

The FEPA directs the Commission to convene a fact finding conference within 120 days of the date the charge was filed. The purposes of this conference are: "obtaining evidence, identifying issues in dispute, ascertaining the positions of the parties, and exploring the possibility of a negotiated settlement of the controversy." Ill. Rev. Stat. ch. 48, §858(b) (1979) (J.A. 45).

In this case, Mr. Logan complied with the 180 day limit for filing charges. He filed his charge *pro se* only five days after the Company terminated his employment. It then was the Commission's responsibility to convene a fact finding conference within 120 days (by March 13, 1980). On January 28, 1980 (45 days before the end of the 120 day period) the Commission notified the parties that they would be required to attend a fact finding conference on March 18, 1980. The investigator had negligently misread her calendar and had scheduled the conference for five days after the expiration of the 120 day period. The "Notice of Fact Finding Conference" announced the date, time and place of the conference and also indicated that attendance is mandatory. However, no notice was included that the conference must be held within 120 days from the filing of the charge (J.A. 5-6).

On January 28, 1980, the Commission also sent a questionnaire to the Company and directed that the Company submit answers by March 10, 1980. On March 7, 1980, the Company submitted answers to the Commission's questionnaire. The Company did not object at this time to the March 18 date for the fact finding conference.

On March 18, 1980, at the beginning of the fact finding conference, the Company's attorney presented the Commis-

sion's investigator with a written motion asserting that because the conference had not been convened within 120 days of filing, the charge should be dismissed. The investigator's supervisor denied the motion. The Company's attorney refused to participate in the fact finding conference and walked out. Mr. Logan appeared *pro se* at the conference.

Two days later, the Company filed a motion for leave to file its petition for an original writ of prohibition in the Illinois Supreme Court (J.A. 17). Leave was granted on March 25, 1980. The court also stayed proceedings on Mr. Logan's charge pending disposition of the petition for a writ of prohibition.

Mr. Logan sought legal assistance from the Edwin F. Mandel Legal Aid Clinic of the University of Chicago on April 23, 1980. Because 180 days had not passed since the act of discrimination, Mr. Logan filed a new charge raising the same claim.

Mr. Logan responded to the Company's petition for a writ of prohibition by filing with the Illinois Supreme Court a motion to dismiss or, in the alternative, to stay proceedings on the Company's petition. He argued, *inter alia,* that to terminate his claim simply because the Commission had failed to convene a fact finding conference within 120 days would violate his constitutional rights under the Fourteenth Amendment to due process and equal protection. Mr. Logan also argued that the Company had waived its objection to the late scheduling of the fact finding conference and should be estopped from raising the issue at the conference. The Company had received notice of the conference 45 days prior to the date it was held and participated in the pre-conference procedures by answering a questionnaire sent to it by the Commission (J.A. 9-11). He also argued that because he had filed a second identical charge within the 180 day period, the Company's petition should be denied on the grounds that it had become moot. The Fair Employment Practices Commission, arguing against termination of Mr. Logan's charge, contended that

the words of the statute were discretionary and did not mandate the dismissal of the charge.

The Illinois Supreme Court awarded the Company a writ of prohibition on September 29, 1980. The court disagreed with the Commission's contention that the 120-day period was merely a discretionary time period. The court held, instead, that the time limit was mandatory. Although the 120-day limit had never before been construed by the court to be mandatory, the court held that the employee's charges should be terminated (J.A. 28-36).

The court also held that the Company had not waived its right to object to the late scheduling of the fact finding conference. According to the court, the Company had responded to the Commission's questionnaire only because it would have been held responsible for failing to do so. The court also noted that "it is not shown . . . that the 120-day period . . . would expire before the scheduled date of the conference." (J.A. 34).

The Court then disposed of Mr. Logan's constitutional arguments by stating that:

> We also are not persuaded by the employee's protests that his rights to due process and equal protection were violated. The statutory scheme here was to provide, through administrative and judicial channels, a means of relief from discriminatory employment practices. The legislature could establish reasonable procedures to be followed upon a charge, and the observance of them here did not violate his constitutional rights.

(J.A. 34-35). The court then ruled against Mr. Logan's contention that the question regarding the fact finding conference was made moot because he had filed a second charge with the Commission within the required 180-day period. (J.A. 35). Mr. Logan had claimed that his second charge should be governed by the Human Rights Act, which had become effective on July 1, 1980 (Ill. Rev. Stat., 1979 Supp., ch. 68, ¶ 1-101 *et seq.*) and which made the convening of a fact finding conference discretionary. The court held that even if the

amended act made a fact finding conference discretionary, the amended statute did not apply. "A statute will be given prospective application unless there is a clear expression of legislative intent that it is to be retroactively applied." (J.A. 35).

Finally, the court concluded that to allow Mr. Logan to file a second charge "would frustrate the design of [the FEPA] and, in a case such as this one, would allow the Commission, despite its failure to comply within the Act, to proceed on an identical charge after the first charge had already expired or suffered dismissal." (J.A. 36).

SUMMARY OF ARGUMENT

I. Mr. Logan lost his case solely because the investigator negligently scheduled the fact finding conference beyond the 120 day limit set in the FEPA. He lost even though it was the responsibility of the Commission to schedule the fact finding conference within the proper time. The Illinois Supreme Court violated due process by ordering that his case be dismissed without any decision being made by the Commission or the Court based on the merits of the case or on the conduct of the parties. The Illinois Supreme Court was also wrong because no notice was given by the Commission of the impending termination of Mr. Logan's case and what procedures he could use to correct the mistake. This Court should reverse and rule that Mr. Logan's procedural rights have been violated.

A. This case falls within the very heart of procedural due process procedures which have been identified in this Court's decisions. The State must provide notice of an impending termination of those rights which qualify for protection as "property" under the Fourteenth Amendment. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). The State must also provide notice of the procedures available to complain about the termination of rights at least before the termination becomes final. *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1 (1978). In any event, the absolute minimum procedural re-

quirement is that the State must make a conscious and deliberate decision to terminate the rights. *Bell* v. *Burson*, 402 U.S. 535 (1971).

No notice was given to Mr. Logan that failure to convene the fact finding conference within 120 days from the date the charge was filed would result in his case being dismissed and his rights under the FEPA being terminated. The Notice of Fact Finding Conference sent to Mr. Logan did not comply with the notice required by Due Process. It only advised him that he must attend the schedule fact finding conference in person. It never advised him that the conference must be scheduled within the 120 day time period. Nor did the statute mention that termination might result from the failure to schedule a fact finding conference within the 120 day period. *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1 (1978), should be directly applied to this case and its requirements made applicable to the FEPA. *Memphis Light* required prior notice of the impending termination of utility services and the establishment of administrative procedures to complain about the proposed termination and notice of how to use the procedures to make a complaint. As in *Memphis Light*, the nature of the parties, the controversy and the procedural setting demonstrate that these requirements are necessary to assure that laymen are fairly treated.

Application of the three-part test in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), also establishes that prior notice of the termination and the procedures to complain are required by due process: (1) Mr. Logan's interest in proceeding with his case under the Fair Employment Practices Act was important; (2) there was a very high risk of an erroneous deprivation of Mr. Logan's rights because he was never given the opportunity to prove that the Company had discriminated against him, and the risk could have been avoided by notifying him of the 120 day requirement and his rights to ask to have the fact finding conference rescheduled; and (3) the additional procedural safeguards of notice and a chance to complain would have imposed upon the state or the public interest no significant additional costs or burdens.

Mr. Logan's due process rights were also violated because the Commission permanently terminated his claims without regard to its merits or diligence of either adverse party. When the State sets up an adjudicatory system to decide which of two private parties should prevail, a decision is the bare essential to which the parties are entitled. The FEPA created an entitlement for Mr. Logan to present his version of the facts and his arguments about why he should prevail. Having created this substantive entitlement, the State cannot condition it on procedural requirements which eviscerate the entitlement itself. The determination of liability between the parties cannot turn on the fortuity of the investigator's negligence. Rather, it must be related to which party should prevail in the action. To do otherwise would give the Company a defense which is "wholly arbitrary or irrational" in violation of due process. *Martinez* v. *California*, 444 U.S. 277 (1980).

B. Mr. Logan has a property interest protected by due process in the right to use the adjudicatory system established by the FEPA to seek recovery for the discrimination he suffered in his employment. This Court has looked to state law to determine whether an interest is "property" within the meaning of the Due Process Clause. *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1 (1978). *See also Board of Regents* v. *Roth*, 408 U.S. 564 (1972) and *Perry* v. *Sindermann*, 408 U.S. 593 (1972). If the interest at stake has been granted to an individual by the state, a "for cause" requirement is a critical indicium of whether that interest is property protected by due process. *See Memphis Light; Barry* v. *Barchi*, 443 U.S. 55 (1979); *Goss* v. *Lopez*, 419 U.S. 565 (1975); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

Mr. Logan's right to adjudicate his claim of employment discrimination is a protected property interest because the provisions of the FEPA, when read together, demonstrate that once this right has been granted to any individual, it cannot be extinguished except on a showing of cause. The FEPA requires the Commission to determine during its investigation whether there is substantial evidence supporting an in-

dividual's charge; after an evidentiary hearing, the Commission decides whether an unfair employment practice has occurred. Under the FEPA, a charge may be dismissed only if it is found to be unmeritorious or if either party defaults. Thus, due process attaches to Mr. Logan's right to use the FEPA's adjudicatory system because that right may be revoked only "for cause."

This Court also looks to the importance of interests underlying an entitlement to determine whether constitutional protection is due. Mr. Logan has interests in his employment and in freedom from discrimination; he has interests in the backpay and other relief he would be awarded should he prevail; he has interests in public vindication of his ability to do his job, regardless of his handicap. These interests are no less important than those that were considered in granting due process protection in *Bell, Goldberg,* and *Goss.*

Further, recognition that Mr. Logan's right to utilize the FEPA's adjudicatory system is a protected property interest does not also require recognition that all causes of action are protected interests. In Mr. Logan's case, due process attaches because he had already been granted access to the Commission's adjudicatory system by filing his charge. Unlike *United States* v. *Kras*, 409 U.S. 434 (1973), this case does not involve denial of access to a judicial forum; rather, it involves the revocation of an important interest which the state had already granted to Mr. Logan.

C. Mr. Logan has a liberty interest protected by the Fourteenth Amendment. This protected interest consisted of a cumulation of interests taken from him as a result of the Fair Employment Practices Commission's termination of his charge of discrimination. Some of these interests, if considered alone, might be insufficient to constitute a protected interest. Under recent rulings of this Court, however, the cumulation of these interests may result in the creation of a liberty interest. *Paul* v. *Davis*, 424 U.S. 693, 701 (1976) (defamation must be combined with an additional "tangible interest" such as employment to be protected); *Owen* v. *City*

of Independence, 100 S.Ct. 1398, 1407 (1980) (the "impugning [of the] petitioner's honesty and integrity," combined with termination of his employment, constituted a protected liberty interest).

Mr. Logan was deprived of (1) the right to have the Fair Employment Practices Commission adjudicate his claim for reinstatement; (2) the right to have the Commission determine whether he was entitled to back pay, attorney's fees and other money damages; (3) the entitlement created by the state not to be discriminated against by his employer; (4) the right to have the Commission determine whether to clear his record for purposes of pursuing future employment; (5) the right to have the Commission vindicate him before his co-workers, peers and the community, and to restore his dignity and self-esteem by determining whether the company discriminated against and wrongly fired him; (6) the right granted by statute to have administrative review by the Circuit Court to correct the misimpression among his co-workers, peers and the community that, by terminating his charge, the Commission had concluded that he had been properly fired for non-discriminatory reasons; and (7) the right to receive the valuable benefit of an investigation and hearing provided by the Commission.

These interests, taken together, constitute a liberty interest protected by the due process clause of the Fourteenth Amendment.

II. Termination of Mr. Logan's employment discrimination claim solely because the investigator failed to convene a timely fact finding conference violates Mr. Logan's right to equal protection of the laws. As interpreted by the Illinois Supreme Court, the statute providing that fact finding conferences are to be held within 120 days requires the blanket elimination of all cases in which the investigator misses the deadline. Two classes of claimants are thus created: those who may exercise the statutory right to pursue their claims under the FEPA and those whose claims are extinguished.

This classification rests on grounds wholly irrelevant to the achievement of the FEPA's two express objectives: protecting employees from discriminatory treatment and protecting employers from unfounded charges. Only a classification that takes into account the merits of charges can rationally promote these objectives. The instant classification is applied before the merits of the charges have even been examined. In *Lindsey* v. *Normet*, 405 U.S. 56 (1972), this Court held that a double bond requirement for forcible entry and detainer appeals was not rationally related to the objective of discouraging unfounded appeals. Like the classification in *Lindsey*, the classification in the instant case does not act to screen out unfounded claims. Instead, it arbitrarily terminates meritorious charges, while giving unfounded claims a hearing and decision.

The classification in the instant case also fails to promote the secondary purpose identified by the Illinois Supreme Court: the "just and expeditious resolutions of employment disputes." *Zimmerman Brush* (J.A. 34). The case dispositions that the classification produces are neither just, nor necessarily expeditious, nor even "resolutions." It is the height of injustice to penalize the charging party for a scheduling mistake that he had no opportunity to prevent. The rule does not rationally act as a means of speeding the processing of cases, because the penalty it imposes falls not on the person in control of the process but on one of the victims of the delay. Above all, the rule's arbitrary termination of claims cannot fairly be characterized as "resolutions" of "disputes"; they are technical escapes from liability that never resolve the underlying controversies.

Even if the Illinois Supreme Court's application of the 120 day limit did induce expeditiousness, that objective would be accomplished in a patently arbitrary and irrational way. Indeed, the arbitrary cutoff of claims such as Mr. Logan's defeats the overriding governmental purpose that the FEPA was meant to further. The classification that has been used to cut off Mr. Logan's claim of employment discrimination is irrational and violates his right to equal protection of the laws.

ARGUMENT

I. Due Process Has Been Violated Because Mr. Logan's Action Under The Fair Employment Practices Act Has Been Terminated Solely On Account Of The Negligence Of The Commission's Investigator In Failing To Hold The Fact Finding Conference On Time.

A. Due Process Requires That Mr. Logan Be Given The Opportunity To Be Heard On His Charge Of Employment Discrimination And That A Conscious And Intentional Decision Be Made About Whether He Should Prevail.

The issue presented is whether Mr. Logan was entitled under the Due Process Clause to have his charge of discrimination decided on the merits or be timely notified that it would not be so decided. The Illinois Supreme Court held that it was reasonable for Mr. Logan's discrimination action to be absolutely and finally terminated solely because the investigator negligently and mistakenly scheduled the fact finding conference to be held five days late. Termination of cases solely because of a scheduling mistake by the investigator cannot be permitted under the Due Process Clause. Our citizens are entitled to more; if they resort to our justice system, they are entitled at least to a conscious and intentional decision on the merits of the case or on an issue rationally related to which party ought to prevail. At an absolute minimum, if cases are to be terminated without regard to the merits or the diligence of the adverse parties in meeting their procedural obligations, notice should be given to the party affected so that he can take action to preserve his case. Such notice is essential if even the appearance of fair and evenhanded treatment by the adjudicatory body is to be maintained.

The facts of this case demonstrate the unfairness of the Illinois Supreme Court's ruling. Mr. Logan, proceeding without counsel (as a great many of those who bring charges to the FEPC) diligently performed all that could reasonably by expected of him. Mr. Logan was denied his rights to redress without any decision on his claim wholly because the

investigator misread her calendar and inadvertently scheduled the fact finding conference five days too late. Such a result violates due process. Due process requires that (1) Mr. Logan should have recieved prior notice of the impending termination of his rights and notice of the procedures available within the Commission to complain about such termination, or (2) the inadvertent or negligent failure of the investigator to hold the conference within 120 days should have been excused and a decision rendered in Mr. Logan's charge in the absence of any showing either that Mr. Logan was responsible for the mistake or that the Company was prejudiced by the 5-day delay.

The unfairness and unreasonableness of the process approved by the Illinois Supreme Court is apparent if we consider the role of an attorney, paralegal or law student who has the unpleasant duty of counselling persons like Mr. Logan who have lost their rights solely because the Commission failed to meet one of its statutory deadlines. It can be expected that the client will first inquire why he lost his case and why his employer won. The counsellor will most likely respond in a straightforward way that he lost his case because the Commission was too busy or negligent and did not get to his case in time. The client would probably inquire whether he lost his case because the Commission decided that the Company had not discriminated against him. "No, they never decided anything, they just failed to reach your case in time," the counsellor might reply. "But why then did they decide for the Company?" might be the next question. The counsellor would now recognize that the client does not understand how it is he lost without any decision being made. He would explain to his client again that the Commission failed to perform its duties under the law and that the penalty for this failure has been to dismiss his case. "But why am I being penalized, I didn't do anything wrong. I filed my charge within the time limits. I cooperated with the investigator and never delayed anything. Why should I lose?" At this point the counsellor will likely resort to his ultimate answer and tell the client that he lost not because of his fault but because the law

says so and this is a nation of laws. But then the client will probably ask, "But why didn't they tell me about the deadline, so I could have tried to do something?" The counsellor would surely advise the client that if he had received notice before the deadline had passed, he could have contacted the Commission and asked if it was going to meet the deadline. If the Commission indicated it would not, he might have been entitled to a writ of mandamus or equitable relief to force the Commission to meet the deadline. But now it is too late. His case is closed.

Having been admitted to the state's adjudicatory system, Mr. Logan had a protected interest in being treated fairly and rationally by that system. This principle underlies the opinion in *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), in which the Court expressed concern for "a fundamental value in our American constitutional system":

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society. Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the "state of nature."

Id. at 374. There is neither order nor predictability in an adjudicatory system which negligently extinguishes a cause of action. Such a system makes a mockery of due process of law.

1. Procedural Due Process Requires Prior Notice That Holding The Fact Finding Conference Within The 120-Day Limit Is Mandatory And The Establishment Of Procedures For Complaining To The Commission About Its Failure To Meet The Deadline, Including Notice Of The Procedures.

In the present case, due process could have been satisfied with very little. The Commission's investigator sent a Notice of the Fact Finding Conference to Mr. Logan and the Company requiring them to attend the conference (J.A. 5-6). The Notice did not indicate that the fact finding conference must be held within 120 days of the filing of the charge. At a minimum, Mr. Logan should have been notified that if the fact finding conference was not held within 120 days of his filing of the charge, his case would be terminated. Had he received such notice, he would have had the opportunity to discover the mistake and avoid its consequences by demanding a new date from the investigator or by seeking injunctive relief in court.

This Court has directly held that notice must be provided before the government can revoke a valuable right. In *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1 (1978), this Court set forth the notice required by due process before a municipality can terminate electric service to a consumer. Two important elements of notice were required to satisfy due process: (1) the consumer must receive notice of the proposed termination of service; and (2) the consumer must actually be given notice of "the availability of an avenue of redress." *Id.* at 13. This Court recognized that the "Final Notice" given by the municipality was "adequate to apprise the [consumer] of the threat of termination of service." *Id.* at 14. Nevertheless, a due process violation was found because the consumer "was never apprised of the availability of a procedure for discussing her dispute 'with management.' " *Id.* at 13-14. In Mr. Logan's case, no notice whatsoever was given that his charge would be extinguished if the Commission's investigator failed to convene the fact finding conference within 120 days.

As in *Memphis Light*, Mr. Logan received no notice of the availability of any administrative procedures by which he could complain about the scheduled date of the fact finding conference and request that it be rescheduled within the 120 day period. *Memphis Light* required that administrative procedures be established and notice provided even though there was a judicial remedy available to the consumer to enjoin the proposed termination of services. The Court considered the fact that utility terminations are the type of disputes for which few consumers will retain counsel. Likewise, the FEPA has designed a system in which laymen can assert their claims without counsel and rely on the Commission to fulfill its requirements in conducting the investigation and determining whether there is sufficient evidence to justify issuing a complaint and holding a hearing. Notice is required to advise laymen of the critical significance of all mandatory deadlines so that they can monitor the progress of their cases and take action to assure that their rights are not lost because one of the deadlines will not be met. Nor does it suffice that there are judicial remedies available to force the Commission to meet its statutory deadlines. Laymen are entitled to an administrative procedure and notice of how to use the procedure to prevent the termination of their rights, just as was required of the municipal utility in Memphis Light.[1]

That due process required prior notice to Mr. Logan can also be demonstrated by applying the test announced in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). Justice Powell identified three factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used," and "the probable value, if any, of additional or substitute procedural safeguards," and (3) "the Government's interest, including the function involved and the fiscal and ad-

[1] In other contexts this Court has excused procedural failures by *pro se* litigants which would not have been excused if made by a party represented by an attorney. *See Haines* v. *Kerner*, 404 U.S. 519 (1972); *Conley* v. *Gibson*, 355 U.S. 41 (1957).

ministrative burdens that the additional or substitute procedural requirement would entail." *Id.*

First, Mr. Logan's interest is very important—he is seeking, among other things, to be vindicated through adjudication of his charge of discrimination in employment, to be reinstated to his job, to be awarded back pay and attorneys fees, and to have the company be ordered to terminate its discriminatory activity. *See infra* at 34.

Second, there is a high risk of an erroneous deprivation.[2] There is no correlation between those charges for which the investigator failed to convene a timely fact finding conference and those charges which should be dismissed. If the conference is held too late due to the fault of the charging party, his charge could fairly be dismissed. But no such assertion has been made about Mr. Logan. Also, no consideration of the merits or relative merits of charges is permitted when charges are terminated solely because of the failure to convene a timely fact finding conference. Non-meritorious cases for which a fact finding was held on time, will remain alive and continue to be investigated until there is a determination by the investigator of whether there is substantial evidence to support the charge. The likelihood of an erroneous deprivation is further increased because there is no judicial review of a charge terminated for failure to convene the fact finding conference within the 120 days. If, however, the fact finding conference is held and the investigation is completed, a claimant may ask the Commission to reconsider an unfavorable determination. Rules and Regulations of the Fair Employment Practices

[2] Of course, the "error" at issue is not the likelihood of erroneous determinations that the 120 day time limit has passed, but rather, the likelihood that cases which would have been won, on the merits, will instead be dismissed. "[I]n reviewing state action in [the area of procedural due process] . . . we look to substance, not to bare form, to determine whether constitutional minimums have been honored." *Bell* v. *Burson*, 402 U.S. 535, 541 (1971), citing *Willner* v. *Committee on Character*, 373 U.S. 96, 106-107 (1963) (concurring opinion).

Commission, §§4.5, 4.7, 5.7; Appendix to this Brief at 57. The FEPA also provides for judicial review in circuit court. Ill. Rev. Stat. ch. 48, §860 (1979) (J.A. 53).

Furthermore, the probable value of additional procedural safeguards is very great. The Commission should provide advance notice before the failure to convene a timely fact finding conference can be used as the basis for terminating a charge. The value of advance notice is that it returns control to the charging party to insure that the time requirement is met. If the investigator decides not to reschedule, other legal action could be taken to keep the charge alive. If the charging party did not act then, he could be held accountable for his failure.

Third, the government's interest would be served by a notice requirement, and this safeguard would involve no significant extra cost or administrative burden. The legislature intended that every charging party ultimately receive a decision on his charge. The language of the statute is silent about what should happen in the event that the fact finding conference is not held within the proper time. The public interest weighs heavily in favor of adjudicating the merits of these charges. The legislature has indicated that its policy and purpose for enacting the FEPA is to provide redress for discrimination in employment and clearing employers of unfounded charges. Ill. Rev. Stat. ch. 48, §851 (1979) (J.A. 37). The proposed notice would accomplish these purposes.

The administrative costs are minimal because the FEPC already sends a "Notice of Fact Finding Conference" to both parties. Words should be added indicating that (1) the conference must be held within 120 days from the date the charge was filed or the charge will be dismissed; (2) if the conference has been scheduled to be held later than the 120 days, the charging party should contact the investigator to reschedule the conference or the charge will be terminated; and (3) if the investigator refuses to reschedule the conference within the 120 day period, the charging party is entitled to receive notice of the reasons and a chance to be heard about why the con-

ference should be rescheduled and the investigation continued. The costs of drafting the language for the Notice are very small. There is no increased cost for printing or mailing since the notice is already sent. The only serious administrative costs involve having the investigator check his calendar and state why his calculation of the time period is correct. This too is a minor cost. As shown above, the result of weighing all the interests is overwhelmingly in favor of requiring that prior notice and hearing be provided.

This Court has consistently held that notice is the bare minimum required for due process. In *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), notice by publication was held to be constitutionally insufficient to alert known trust beneficiaries to the pendency of a judicial settlement of trust accounts. The Court refused to rule that beneficiaries who had not kept informed about the pendency of settlement proceedings had thereby abandoned their claims. The legal fiction that all persons are expected to know the law and their rights was not found to be sufficient. The Court required actual notice before property rights are terminated by an adjudication. In the present case it might be argued that Mr. Logan should have known that Illinois law would be interpreted to require that the fact finding conference must be held within 120 days, checked his calendar, determined the error, and attempted to reschedule the conference. This Court should follow *Mullane* and likewise reject this argument against requiring actual notice here.

Failure to provide notice is an especially significant violation of due process when such failure results in the final deprivation of an important state right. Such notice must occur prior to the deprivation. It is a prerequisite to obtaining a hearing to contest the proposed deprivation. In *Armstrong* v. *Manzo*, 380 U.S. 545 (1965) the Court required that a divorced father receive notice sufficient to alert him to an adoption action brought by his ex-wife's new husband, and to afford him an opportunity to present his objections before he finally lost his parental rights. *Id.* at 549. In *Sniadach* v.

Family Finance Corp., 395 U.S. 337 (1969), the Court demanded that a worker be given notice prior to the garnishment of his wages. In *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), the Court recognized that the critical functions of the prior notice and hearing requirements are to provide a means for avoiding wrongful deprivations before they occur. In Mr. Logan's case, the lack of notice of the consequences of failing to convene a fact finding conference within 120 days effectively deprived him of all his rights and remedies under the FEPA. By the time Mr. Logan had any idea that he stood to lose his right to use the adjudicatory system provided by the FEPA because of the investigator's negligence, the 120 day deadline had passed.

2. Due Process Was Violated Here Because There Was Never Any Decision Made To Adjudicate Mr. Logan's Rights. Terminating His Rights On Account Of The Negligence Of The Investigator Is Wholly Arbitrary And Irrational.

In the circumstances of this case, due process must also require that Mr. Logan is entitled to have the Commission make a decision on whether there is substantial evidence to issue a complaint. According to the Illinois Supreme Court's decision, the failure of the investigator to hold the fact finding conference within 120 days terminated Mr. Logan's action finally and absolutely.[1] Indeed, it also extinguished the second charge he filed with the Commission even though that second charge was timely filed within 180 days of his firing. No one ever decided whether his claim of discrimination should be terminated "for cause."

A decision based on the merits or on the conduct of one of the parties is a second traditional minimum requirement of

[1] Mr. Logan's claim is thus unlike a charge of employment discrimination filed in the Equal Employment Opportunity Commission ("EEOC"). The claimant always retains his rights to pursue his Title VII action in the United States District Court. 42 U.S.C. §2000e-5(f)(1).

due process.[4] In *Bell* v. *Burson*, 402 U.S. 535 (1971), this Court struck down a statute which authorized the suspension of an uninsured motorist's driver's license without a preliminary inquiry to determine whether there was a reasonable possibility that a judgment would be rendered against the licensee. *Id.* at 540.

On the other hand, in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), the Court held that Social Security disability benefits could be terminated without a prior full hearing because several merit-based decisions were required, *i.e.*, preliminary state review of medical evidence, determination by administrative officials after notice and comment, *de novo* review and formal hearing. *See also Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (welfare benefits not to be terminated without a decision on the merits).

In the next section of this brief, Mr. Logan argues (*infra* at 29) that a critical factor in determining that he has a protected interest is that the FEPA, when read as a whole, has created entitlements which can be terminated only "for cause." Once the substantive rights are determined to be subject only to a "for cause" termination, the procedures must not circumvent the "for cause" requirement. If they do, due process is violated.

This analysis of separating the procedures from the substantive right has been used in *Bell* v. *Burson*, 402 U.S. 535 (1971). This Court rejected procedural requirements of a Georgia statute that called for the suspension of a driver's license of anyone involved in an accident who failed to post

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[4] Due process requires "an opportunity . . . granted at a meaningful time and in a meaningful manner," *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965), "for hearing appropriate to the nature of the case," *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The exact timing of the hearing may vary. *Opp Cotton Mills, Inc.* v. *Administrator, Department of Labor*, 312 U.S. 126, 152-53 (1941). The degree of formality may vary. *Goss* v. *Lopez*, 419 U.S. 565, 583 (1975).

bond or carry liability insurance. The Court determined that the only purpose for the bond was to obtain security to pay any damages for which the driver might ultimately be found liable. The Court concluded, therefore, that a determination of the probability of liability must be made in the suspension proceeding before the license could be suspended.

A decision about whether there is "cause" to require posting the bond and suspending the license for failure to do so was the necessary procedural corollary to the substantive entitlement. Once the state creates such an entitlement, the procedures must provide for a decision based on "cause." In this case the use of the Commission's failure to meet the 120 day deadline to defeat claims subverts the "for cause" requirement of the substantive right created by the FEPA. If allowed to stand, this mandatory time limit would convert the "for cause" substantive requirement into one merely "at will." Due process is therefore violated because the state has eliminated the entitlement to a "for cause" determination contemplated by the FEPA's creation of the substantive right.

In both *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) and *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), a decision on the merits was required before a private party could avail himself of state procedures for altering property rights of other private parties even though the alteration would involve only a temporary deprivation. The need for a decision on the merits is even more acute when the deprivation of an interest is permanent. In *Barry* v. *Barchi*, 443 U.S. 55 (1979), the Court found that the post-suspension hearing provided by the statute violated due process because it was not held soon enough after the suspension to avoid a *de facto* final deprivation. In *Goss* v. *Lopez*, 419 U.S. 565 (1975), the Court found that the temporary suspension of students from public schools without a hearing addressing the conduct of the students violated due process because the temporary suspension would have a permanent affect on the students' reputations and future educational and employment opportunities. While the degree of finality in both these cases was great

enough to invoke a protected interest, the finality of Mr. Logan's deprivation is far more severe. While the horse trainer in *Barry* may or may not lose his livelihood without a sufficiently timely post-suspension hearing, and the students in *Goss* may or may not be able to overcome the blemish on their records of a temporary suspension from school, Mr. Logan will lose his rights to obtain full relief under the FEPA for the discriminatory conduct of the Company against him.[5]

[5] Justice Stevens has suggested that in the context of property deprivations a "post-deprivation state remedy" may satisfy due process. *Ingraham* v. *Wright*, 430 U.S. 651, 701 (1977) (Stevens, J., dissenting).

> When only an invasion of a property interest is involved, there is a greater likelihood that a damages award will make a person completely whole. . . .

Id. See Kimbrough v. *O'Neil*, 523 F.2d 1057, 1062 (7th Cir. 1975) (Stevens, J., concurring), *aff'd on rehearing en banc*, 545 F.2d 1059 (1976). *Cf., Bonner* v. *Coughlin*, 517 F.2d 1311, 1318-1320 (7th Cir. 1975), *modified en banc*, 545 F.2d 565 (1976).

Application of Justice Stevens' approach establishes that due process has been violated in this case. It is not certain that a compensatory remedy is provided by Illinois law against the investigator or, under the Court of Claims Act, against the Commission. Ill. Rev. Stat. ch. 37, §439.1 *et seq.* (1979). Even if it were, Mr. Logan could not obtain the same remedies he would have had against the company under the FEPA. He would not be reinstated with the company. He would not obtain an order against the company to cease its discriminatory practices against the handicapped. Mr. Logan's employment record would not be cleared of the discriminatory discharge. And he would not receive vindication of his right to be free from unlawful discrimination. These remedies would not be available in an action against either the investigator or the Commission.

The only alternative remedy Mr. Logan might have against the company would be an action for damages provided by the Equal Opportunity for the Handicapped Act ("EOHA") which also makes it a misdemeanor for employers to engage in discriminatory employment practices. Ill. Rev. Stat. ch. 38, §65-21 *et seq* (1979). This alternative does not offer as broad a range of remedies as the

The termination of Mr. Logan's claim prevented him from receiving a decision based on the merits or on the conduct of one of the parties. First, there was no evaluation of the strength of his case. Mr. Logan agrees that the legislature could provide for the screening of cases by the Commission and that the procedures provided in the FEPA would have been constitutionally sufficient if such a screening had indeed been done. Mr. Logan also agrees that the use of the "substantial evidence" test in the FEPA for the evaluation of cases is appropriate. In the instant case, however, neither the investigator nor the Commission ever made such a determination. Mr. Logan, in fact, is worse off than if the Commission had found no substantial evidence, because that finding would have been reviewable in the state courts under the Administrative Review Act. *See* Ill. Rev. Stat. ch. 48, §860 (1979) (J.A. 53). Mr. Logan is instead left with no judicial review and no cause of action due to a process which is purely arbitrary.

FEPA provides (e.g., it contains no provision for the award of attorney's fees). Also the definition of the handicapped and the determination of what constitutes defenses to an EOHA action has not been consistently determined by Illinois courts. There are only two appellate cases interpreting the EOHA. Although a generous construction was adopted in *Lyons* v. *Heritage House Enterprises*, 92 Ill.App.3d 668, 415 N.E.2d 1341 (4th Dist. 1981), the narrower construction approved in *Advocates for the Handicapped* v. *Sears, Roebuck & Co.*, 67 Ill.App.3d 512, 385 N.E.2d 39 (1st Dist. 1978) would control because Mr. Logan's action arose in Cook County.

Furthermore, such an action by Mr. Logan would surely be met by arguments that the action is precluded by the Illinois Supreme Court's decision. At the time Mr. Logan's FEPA charge was terminated by the writ of prohibition, the 180 day time period for filing a charge had not yet run. He therefore filed a second identical charge. The court ruled that failure to terminate the second charge would "frustrate the design of [the Act]" citing as one of its concerns the prejudice to the employer's rights. *Zimmerman Brush Co.* v. *Illinois Fair Employment Practices Commission*, (J.A. 35-36).

Second, the termination of Mr. Logan's charge was not based on any procedural failing by him. Mr. Logan did not delay the proceedings. The termination is unlike dismissal for failure to comply with a statute of limitations. Ordinarily the individual controls the initiation of the proceedings and is fairly held accountable for failing to meet statutory deadlines. In this case, Mr. Logan filed his charge only five days after the discriminatory act, well within the 180-day time limit provided by the FEPA. He complied with all the procedural requirements of the statute, only to have his claim extinguished because of neglect by the administrative agency processing it.

Martinez v. *California*, 444 U.S. 277 (1980), held that a state may limit the defenses available against certain statutory claims, provided the conduct of the state is not "wholly arbitrary or irrational." *Id*, at 282. Providing for the termination of Mr. Logan's charge is wholly arbitrary and irrational in violation of the due process clause, because it is based neither on an evaluation of the strength of his claim nor on a determination of his diligence. In our system of resolving private disputes through adjudication by the state rather than through self-help and other means, it is wholly arbitrary and irrational to "adjudicate" by an accident or an inadvertent, negligent act rather than a conscious decision.

B. Mr. Logan's Right To Use An Adjudicatory System Was An Entitlement Conferred Upon Him By The State And Was A Property Interest Protected By Due Process.

Mr. Logan had a protected property interest in the use of an adjudicatory system of the state to vindicate his right to be free from discrimination in his employment. The State of Illinois created an entitlement by enacting the Fair Employment Practices Act, which provides victims of discrimination with a forum in which to seek recovery and procedures to facilitate resolution of disputes. By accepting Mr. Logan's charge, the state acknowledged that it had granted him an entitlement which the FEPA states can only be permanently extinguished upon a showing of cause.

This Court has recognized that a plaintiff's cause of action can be a protected interest. In *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), notice by publication was held insufficient to alert known trust beneficiaries to the pendency of a judicial settlement of trust accounts. The Court recognized that the beneficiaries had two interests at stake. One was an interest in the corpus of the trust, which is "presumably subject to diminution in the proceeding by allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest." *Id.* at 313.

The other interest was in "their rights to have the trustee answer for negligent or illegal impairments of their interests." *Id.* Although an interest in a suit for breach of fiduciary duty arises from the trust itself, it clearly is distinct. A beneficiary's suit against a trustee need not be directly related to efforts to protect the corpus of the trust; indeed, a beneficiary may recover for breach of fiduciary duty even if impairment of the trust fund is merely remote or speculative. In *Mullane,* a beneficiary's right of action against his trustee would have been cut off if he did not appear at the settlement hearing and assert that a fiduciary duty had been breached. Thus, it was the right to sue that was impaired by lack of notice. In holding that due process required adequate notice, the Court recognized that the beneficiaries' cause of action was a protected property interest.

The source of the protected interest in *Mullane* was New York statutory and common law. As this Court has long recognized, what is property within the meaning of the Due Process Clause is determined by "an independent source such as state law." *Memphis Light, Gas & Water Division* v. *Craft,* 436 U.S. 1, 9 (1978). *See also Board of Regents* v. *Roth,* 408 U.S. 564 (1972); *Perry* v. *Sindermann,* 408 U.S. 593 (1972). Likewise, an examination of Illinois law demonstrates that Mr. Logan has a protected property in-

terest. When Mr. Logan filed his charge under the FEPA, the State of Illinois entitled him to adjudicate his claim.[6]

The FEPA provides that when a person has been the victim of an unfair employment practice he begins his action by filing a charge with the Fair Employment Practices Commission. Ill. Rev. Stat. ch. 48, §858(a) (1979) (J.A. 45). The Commission then undertakes an investigation to ascertain the facts relating to the alleged discrimination. After this investigation, which includes a fact finding conference that both the employer and the employee must attend, the Commission's investigator determines whether there is substantial evidence that a discriminatory employment practice has been committed. If the investigator finds no substantial evidence, the charging party can file a request for reconsideration and submit additional evidence in support of his allegation. If the investigator, or the Commission upon reconsideration, finds substantial evidence, the Commission issues a complaint. The

[6] The action created by the FEPA is to be sharply distinguished from an enforcement proceeding conducted by an agency or government official such as that provided for by the National Labor Relations Act, 29 U.S.C. §151 *et seq.* Under that statute, the action for an unfair labor practice vests in the National Labor Relations Board ("NLRB") and the prosecution of such a case is controlled entirely by the NLRB General Counsel. The General Counsel's refusal to issue a complaint is not reviewable either by the NLRB or, in general, by the courts. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 138-39 (1975).

By contrast, a victim of employment discrimination is given a private right of action under the FEPA. The presentation of an FEPA case is controlled entirely by the complainant. The complainant files appropriate motions, conducts discovery and pre-hearing procedures, and presents evidence and argument. Ill. Rev. Stat. ch. 48, §858.01(b) (1979). Additionally, the FEPA gives a complainant the right under the Administrative Review Act for judicial review in the Circuit Court of any "order of the Commission," including review of a Commission's finding of no substantial evidence or a final Commission decision on the merits. Ill. Rev. Stat. ch. 48, §860 (1979).

charging party then prepares and presents his case before an administrative law judge at a full evidentiary hearing. The judge issues a recommended order which is reviewed by the Commission, which then issues a final order. At each step of the process, the decision to proceed or terminate the action must be made "for cause" — that is, whether substantial evidence has been shown by the investigation, whether an unfair employment practice has been proven at the hearing, or whether at any point either party should lose because he has failed to act diligently.

The "for cause" requirement is one of the necessary elements this Court considers in determining whether there is a property interest. Several cases of this Court show that a "for cause" requirement is the primary indicium of the existence of a constitutionally protected statutory entitlement. In *Memphis Light, Gas & Water Division* v. *Craft,* 436 U.S. 1 (1978), the Court found that under Tennessee law utility services could not be terminated if there was a bona fide dispute over the amount of the bill and whether it was due and owing. *Id.* at 9-10. The Court stressed that "[b]ecause petitioners may terminate service only 'for cause,' respondents assert a 'legitimate claim of entitlement' within the protection of the Due Process Clause." *Id.* at 11-12.

In *Goldberg* v. *Kelly,* 397 U.S. 254, 262 (1970), the Court found a protected property interest in welfare benefits noting that "[s]uch benefits are a matter of statutory entitlement for persons qualified to receive them." Because the state could not terminate a recipients' benefits without cause, the Court found that the requirements of due process applied. In *Goss* v. *Lopez,* 419 U.S. 565, 573 (1975), a protected interest in the right to education was recognized because, under Ohio law, students may not be suspended from school "without any grounds whatsoever." In *Barry* v. *Barchi,* 443 U.S. 55 (1979), a horse trainer's professional license was held to be protected because the license could not be revoked unless the trainer was found to have been "at least negligent" in allowing his horses to race while drugged. *Id.* at 64.

In contrast, the Court has found no due process protection for those interests which may be terminated for any reason whatsoever. In *Bishop* v. *Wood,* 426 U.S. 341 (1976), the Court decided that under North Carolina law a police officer's job was terminable at will and without cause; hence no protected interest was implicated. In *Arnett* v. *Kennedy,* 416 U.S. 134 (1974), the Court was divided over whether Kennedy had received sufficient process when he was discharged from public employment. All nine Justices agreed, however, that Kennedy had a protected interest because his employment was terminable only "for cause."

These cases demonstrate the critical importance of "for cause" in determining whether an individual has an interest entitled to due process. The FEPA mandates a "for cause" showing before final disposition can be made of a charge of employment discrimination. The investigator must determine whether there is substantial evidence, and the administrative law judge and the Commission must decide whether an unfair employment practice has been committed. Of course, the rights of either party may be terminated at any stage if the party fails to act with due diligence.

The Court also looks to the importance of an underlying interest in deciding whether there is a property interest to which due process protection attaches. *Bell* v. *Burson,* 402 U.S. 535 (1971), involved the suspension of the driver's license of a minister who needed the use of his car in his work. The Court determined that "continued possession [of a license] may become essential in the pursuit of a livelihood." *Id.* at 539. Because employment was deemed to be important, the Court found the driver's license to be a protected interest. In *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337 (1969), the Court found a protected interest in wages subject to garnishment proceedings. According to the Court, "[a] prejudgment garnishment . . . may impose tremendous hardship on wage earners with families to support." *Id.* at 340. In *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), the Court found a protected property interest in the continued receipt of state

welfare benefits. The Court underscored the importance of welfare payments by noting that "welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity," and that welfare preserves the individual recipient's dignity by "meeting the basic demands of subsistence." *Id.* at 265. In *Goss* v. *Lopez,* 419 U.S. 565, 575 (1975), the Court found a protected interest in not being suspended from school, stating that charges of misconduct resulting in suspension could "interfere with [students'] later opportunities for . . . employment."

The importance of the interests protected by the FEPA also supports the conclusion that Mr. Logan's right to use its adjudicatory system be accorded due process. The legislature recognized that employment discrimination wastes "the productive capacities of individuals . . . [and] deprives a portion of the population of the State of earnings necessary to maintain a reasonable standard of living. . . ." Victims of discrimination may be forced to "resort to public charity," and the anger bred by discriminatory treatment "may cause conflicts and controversies resulting in grave injury to the public safety, health and welfare." Ill. Rev. Stat. ch. 48, §851 (1979) (J.A. 37). The FEPA gives meaning to these important interests by entitling aggrieved individuals who have filed their charges to use the Commission's adjudicatory system to prosecute their claims. An aggrieved party is entitled to have the Commission investigate his charge and mediate between the parties. The FEPA protects the claimant against discrimination because he "has opposed any practice forbidden in [the FEPA]" or because he "has made a charge, testified or assisted in any investigation, proceeding or hearing under [the FEPA]." Ill. Rev. Stat. ch. 48, §853(d) (1979) (J.A. 40). If the claimant prevails, the FEPA provides that the Commission can order reinstatement, payment of back pay and attorney's fees, and direct the employer to cease the discriminatory practices. Ill. Rev. Stat. ch. 48, §§858, 858.01 (1979) (J.A. 46, 48-49). The benefits granted by the FEPA are no less important state entitlements than the driver's license in

Bell, the wages in *Sniadach*, the welfare payments in *Goldberg*, and the public education in *Goss*.

As the reasoning of a six member majority in *Arnett* v. *Kennedy*, 416 U.S. 134 (1974) suggests, Mr. Logan's substantive rights to use the FEPA's adjudicatory system cannot be limited by procedures that violate due process. *Id.* at 211 (Marshall, J., dissenting). As stated by Justice Powell, the view that a statute can simultaneously create protected interests and limit those interests by procedures that violate due process

> misconceives the origin of the right to procedural due process. That right is conferred, not by legislative grace, but by constitutional guarantee . . . [The legislature] may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate safeguards. As our cases have consistently recognized, the adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Bell* v. *Burson*, 402 U.S. 535 (1971); *Board of Regents* v. *Roth*, [408 U.S. 564 (1972)]; *Perry* v. *Sindermann*, [408 U.S. 593 (1972)].

Id. at 167 (Powell, J., concurring).

Thus, the FEPA's procedures, including the requirement that the FEPC convene a fact finding conference within 120 days of the filing of the charge, must satisfy the demands of due process. The Illinois Supreme Court, in its opinion below, defined Mr. Logan's interest before analyzing the attendant procedures. "The statutory scheme here was to provide, through administrative and judicial channels, a means of relief from discriminatory employment practices." (J.A. 34). Only after the interest was defined by the court did it analyze the procedures to determine whether or not they comported with due process requirements. "The legislature could establish reasonable procedures to be followed upon a charge, and the observance of them here did not violate his constitutional rights." (J.A. 34-35).

Recognition that Mr. Logan's right to utilize the Commission's adjudicatory system is a protected interest does not require recognition that all causes of action are protected interests.[7] Mr. Logan's interest came into being only when he filed his charge and he was granted access to the adjudicatory system established by the FEPA. Thus, the question of whether a plaintiff has a protected *right of access* to the courts — the question addressed in *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), and *United States* v. *Kras*, 409 U.S. 434 (1973) — is not implicated in the present case.

The distinction between cases where plaintiffs seek access to the courts and cases where plaintiffs have already been granted access is closely related to the distinction made be-

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[7] In *Paul* v. *Davis*, 424 U.S. 693 (1976), the Court held that where state law has not guaranteed present enjoyment of reputation, an individual's interest in reputation is not a liberty or property interest under the Due Process Clause. The Court expressed its concern that to hold otherwise "would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the Fourteenth Amendment." *Id.* at 699. *See also Bishop* v. *Wood*, 426 U.S. 341, 349-50 (1976).

In light of this concern, it should be pointed out that for this Court to hold that the termination of Logan's claim violated due process would not open the federal courts to a multitude of actions. Logan does not ask that his employment discrimination action be adjudicated in a federal forum, nor does he seek a federal cause of action against the state or the state agent whose negligence deprived him of his right to proceed. Logan asks only that his cause of action be reinstated before the FEPC and that he have the same opportunity to present his case and have state judicial review that is afforded all other complainants whose claims were not negligently extinguished. Thus, the present case presents no threat to the principle of comity to which this Court adheres: that state courts have sole jurisdiction over actions arising from state law, but that final judgments of state courts are subject to direct review by this Court when the validity of a state statute is questioned "on the ground of its being repugnant to the Constitution . . . ." 28 U.S.C. §1254 (1976).

tween parties contesting the denial of some governmental benefit and parties contesting the revocation of such benefits. In the latter, parties contesting the revocation of governmental benefits have been found to have a protected interest while parties merely contesting the denial of initial receipt of such benefits have not. *See, e.g., Bell* v. *Burson,* 402 U.S. 535, 539 (1971) ("Once licenses are issued . . . . [they] are not to be taken away without that procedural due process required by the Fourteenth Amendment"). *See also* Friendly, *"Some Kind of Hearing"*, 123 U.Pa.L.Rev. 1267, 1296 (1975) ("[T]here is a human difference between losing what one has and not getting what one wants"). *Quoted with approval in Greenholtz* v. *Nebraska Penal Inmates,* 442 U.S. 1, 10 (1979). A victim of employment discrimination may have no constitutional right of access to an adjudicatory system for the vindication of his interest in employment free from discrimination. Mr. Logan does not contend that the state was obliged to create a cause of action for victims of discrimination or a quasi-judicial forum for the adjudication of claims. Nor does Mr. Logan argue that the state may not propound rational rules which may effectively deny some aggrieved individuals access to an adjudicatory system. This case involves no question of access because the state granted Mr. Logan access to the system which it had created for adjudicating employment discrimination claims. When Mr. Logan invested his time and efforts in the filing of his charge and it was accepted by the Commission, he acquired an entitlement that the state could not extinguish except for cause.

C. Appellant Has A Liberty Interest Which Should Be Protected By The Due Process Clause Of The Fourteenth Amendment.

Mr. Logan had a liberty interest protected by the Fourteenth Amendment. This protected interest consisted of a cumulation of interests taken from him as a result of the Fair Employment Practices Commission's termination of his charge of discrimination. A liberty interest originates from one of two sources: it may "originate in the Constitution" or

it may have "its roots in state law." *Meachum* v. *Fano*, 427 U.S. 215, 226 (1976). Additionally, as Justice Stevens noted in *Meachum*, liberty may have a larger scope than that which is defined by law. *Id.* at 233 (Stevens, J., dissenting).

Mr. Logan was deprived of (1) the right to have the Fair Employment Practices Commission adjudicate his claim and determine whether he should be reinstated in his former job (*see supra* at 30); (2) the right to have the Commission determine whether he was entitled to back pay, attorney's fees and other money damages (*see supra* at 30); (3) the entitlement created by the state not to be discriminated against by his employer (*see* Ill. Rev. Stat. ch. 48, §851); (4) the right to have the Commission determine whether to clear his record for purposes of pursuing future employment (*see Goss* v. *Lopez*, 419 U.S. 565, 575 (1975)); (5) the right to have the Commission vindicate him before his co-workers and peers (*Goss* v. *Lopez*, 419 U.S. at 575) and the community (*Board of Regents* v. *Roth*, 408 U.S. 564, 573 (1972)), and to restore his dignity and self-esteem (*Meachum* v. *Fano*, 427 U.S. at 234) by determining whether the Company discriminated against him and wrongly fired him; (6) the right granted by statute to have administrative review in the Circuit Court of Cook County to correct the misimpression among his co-workers, peers and the community that, by terminating his charge, the Commission had concluded that he had been properly fired for non-discriminatory reasons; and (7) the right to receive the valuable benefit of an investigation and hearing provided by the Commission.

Although a direct nexus is required between state action and the deprivation of property interests, this Court has indicated that a direct nexus is not essential to the existence of a protected liberty interest. Where state action has ramifications in wholly private areas which damage a person's interests, a deprivation of liberty may occur.

In *Goss* v. *Lopez*, 419 U.S. at 575, the court stated that where the state had taken action which "could seriously damage the students' standing with their fellow pupils and

their teachers as well as interfere with later opportunities for higher education and employment," a liberty interest has been affected. Although it is not the state which will directly deny the student "later opportunities for higher education and employment," the state's actions have been a factor in bringing about that possibility. The Court has also held that it is not essential that later ramifications be predicted with absolute certainty. In *Goss* v. *Lopez,* there was no certainty that the students' reputations would suffer or that the students would be denied higher education or employment.

Mr. Logan's liberty interest is not diminished merely because the job from which he was fired was not government employment. It was the termination of Mr. Logan's charge, not the actual act of being fired, which formed the basis of state action in this case. This termination deprived Mr. Logan of the opportunity to obtain reinstatement and damages. In *Greene* v. *McElroy,* 360 U.S. 474 (1959), the deprivation of *private* employment, caused by government action, was held to be a sufficient interest to invoke due process protection.

The instant case further resembles *Goss* v. *Lopez* because here, as there, the deprivation of a liberty interest has been coupled with the deprivation of a property interest. In *Goss* v. *Lopez,* state statutes created a right which entitled the students to an education and to attend school. In the instant case, the FEPA entitles protected individuals to be free from discrimination in employment and to utilize the FEPA's adjudicatory system.

Some of the interests enumerated above might be insufficient, if considered alone, to constitute a protected interest And some of the interests, which were discussed above at 30, have traditionally been perceived as having indicia of property. Recently, however, this Court has recognized that a combination of different types of interests may constitute a liberty interest, even though none of the interests taken alone would have qualified.

This Court has held that government employment terminable at will, without more, is insufficient to create a property interest (*Bishop* v. *Wood,* 426 U.S. 341 (1976)), and that defamation by state employees, without more, is insufficient to create a liberty interest (*Paul* v. *Davis,* 424 U.S. 693, 709 (1976)). A protected liberty interest has been found, however, where these two elements are simultaneously present.

In *Owen* v. *City of Independence,* 100 S.Ct. 1398 (1980), the Court implied that combining two interests — neither of which when taken alone would be protected — resulted in the creation of a liberty interest. In that case, the plaintiff's position as Chief of Police was terminable at the will of the City Manager. The employment, taken alone, was not a property interest protected by the Fourteenth Amendment. Because the city was responsible for "impugning the petitioner's honesty and integrity," in addition to terminating his employment, the individual's interest constituted a protected liberty interest.[8] *Id.* at 1407, n.13.

Justice Rhenquist had used a similar test in his opinion in *Paul* v. *Davis,* and declined to find a protected interest in one's "reputation alone, apart from some more tangible interests." *Id.* at 701. Accordingly, he concluded that defamation of an individual by a city police department, without an accompanying deprivation of some other state-created right, was insufficient to receive protection under the due process clause. *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971) was distinguished because the defamation there resulted in the termination of Constantineau's right to purchase alcoholic beverages. The Court held that those two elements — neither of which alone would have been sufficient to constitute a protected interest — may be joined to create a liberty interest.

[8] The Court cited *Board of Regents* v. *Roth,* for the proposition that the plaintiff's loss of employment, coupled with a "charge against him that might seriously damage his standing and associations in his community," *id.* at 573, was sufficient to establish a protected interest. *Owen* v. *City of Independence,* 100 S.Ct. at 1406-1407, n.13.

The Court's recent cases defining protected liberty interests, therefore, have found a liberty interest where no property interest was found. Several Courts of Appeals have concurred with this reading of the Court's recent cases. In *McGhee* v. *Draper*, 639 F.2d 639 (10th Cir. 1981), the failure to renew a teacher's contract, combined with the accompanying damage to reputation, was sufficient to invoke due process protection. The Tenth Circuit held that even though there was no property interest in non-tenured employment (citing *Roth*) and no liberty interest in reputation (citing *Paul* v. *Davis*), the combination of the two constituted a liberty interest. "Plaintiff's alleged reputational damage must be entangled with some other 'tangible interests such as employment.' [*Paul* v. *Davis*, 424 U.S.] at 701. Plaintiff must be allowed to convince the trier of fact that these elements are present." *McGhee* v. *Draper*, 639 F.2d at 643.

Similarly, in *Marrero* v. *City of Hialeah*, 625 F.2d 499 (5th Cir. 1980), injury to the reputation of a company, combined with damage to its goodwill, constituted a protected liberty interest. The Fifth Circuit relied on *Paul* v. *Davis* for the identical proposition: "[A] liberty interest is implicated only when an individual's reputation is stigmatized in connection with the denial of some specific constitutional guarantee or of some 'more tangible' interest. . . . However, the Court [in *Paul* v. *Davis*] indicated that the 'plus' of the stigma-plus requirement need not itself be a protected liberty or property interest." *Marrero*, 625 F.2d at 512-513 n.17.[9]

Under this approach of adding together the various interests given by the state, Mr. Logan has been deprived of a

[9] *See also: Dennis* v. *S & S Consolidated Rural High School District*, 577 F.2d 338, 341 (5th Cir. 1978) (due process rights implicated where an individual is " 'stigmatized in connection with a denial of a right or status previously recognized under state law,' " quoting *Moore* v. *Otero*, 557 F.2d 435, 437 (5th Cir. 1977)); *Johnson* v. *Rogers*, 621 F.2d 300 (8th Cir. 1980); *Colaizzi* v. *Walker*, 542 F.2d 969, 973 (7th Cir. 1976), *cert. denied*, 430 U.S. 960 (1977); and *Larry* v. *Lawler*, 605 F.2d 954 (7th Cir. 1978).

liberty interest and was entitled to due process. As noted above, Mr. Logan was deprived of a variety of interests when his charge of discrimination was terminated.

(1) Mr. Logan has lost the right afforded victims of discrimination under the FEPA to adjudicate his claim and obtain reinstatement. The state affirmatively granted him the right to return to his former job if he could prove he was discriminated against by his employer. Furthermore, like welfare benefits in *Goldberg* v. *Kelly*, 397 U.S. 254, 264 (1970), Mr. Logan's employment provided him with "the very means by which to live . . . ."

(2) Mr. Logan has also lost the right to have the Commission determine whether he is entitled to back pay, attorneys' fees, and other money damages. Like the right to be reinstated, this entitlement was affirmatively granted to Mr. Logan by the FEPA. Thus, Mr. Logan was deprived of the opportunity to recover the money lost as a result of the Company's discriminatory practices.

(3) The FEPA and the Illinois Constitution also entitled Mr. Logan to the right, once employed, to continue in that employment without being discriminated against. The right not to be discriminated against is of fundamental importance in this country and lies at the very heart of the Fourteenth Amendment's prohibition against unequal treatment of similarly situated individuals.

The importance of the FEPA's statutory entitlement is underscored by the fact that freedom from employment discrimination on the basis of handicap is prohibited by the Illinois Constitution. The special protection afforded victims of handicap discrimination in Illinois is evidenced by the language of the state constitution. Article 1, Section 19 provides in pertinent part that "[a]ll persons with a physical or mental handicap . . . shall be free from discrimination unrelated to ability in the hiring and promotion practices of any employer."

(4) Mr. Logan also has suffered a loss with respect to his ability to pursue future employment. Without being afforded the opportunity to have a decision rendered on his discrimination charge, Mr. Logan has a black mark on his employment record, which now shows that he was unable to perform his previous job adequately. As Justice White noted in *Goss* v. *Lopez,* 419 U.S. 565 (1975), where an action by the state "interfere[s] with later opportunities for . . . employment," a liberty interest is implicated. 419 U.S. at 575. As in *Hampton* v. *Mow Sun Wong,* 426 U.S. 88, 102 (1976), Mr. Logan had been given the right by the state not to be subjected to the "added disadvantage [of] ineligibility for employment in a major section of the economy." Although the loss of a single job does not normally result in such an ineligibility, Mr. Logan's future employment opportunities for a great many jobs are adversely affected by having the wrongful firing included on his employment record.

(5) Mr. Logan has been deprived of the esteem of his co-workers because he was fired by his employer, allegedly on the basis of job performance. In *Goss* v. *Lopez,* in determining that there was a liberty interest, the Court stressed the fact that the student had an interest in his reputation among fellow students and in the esteem of his peers. Mr. Logan's interest in his reputation and the esteem of his co-workers should also be taken into account in defining his liberty interest. Mr. Logan as also suffered "damage [to] his standing and associations in his community." *Board of Regents* v. *Roth,* 408 U.S. at 573. The Fair Employment Practices Act gave Mr. Logan the right to employ the Commission's procedures to clear his name and his employment record.

(6) Mr. Logan has suffered a further stigma by having filed a claim with the Commission that he was wrongly fired, and then having that claim terminated without a decision on the merits. That he "lost" his suit before the Commission can only reinforce the belief among his co-workers that he was legitimately fired by the Company for reasons of poor job performance.

(7) Finally, Mr. Logan lost his right to receive the valuable benefits of an investigation and hearing provided by the Commission. This right was conferred, as a benefit, for victims of employment discrimination. As such, Mr. Logan was entitled to full use of that benefit.

The right to utilize an adjudicatory system has been recognized by this Court in the context of prisons. In *Bounds* v. *Smith,* 430 U.S. 817 (1977), the Court held that prisoners have a right of access for filing civil rights actions and prosecuting criminal appeals:

> By contrast [to a discretionary review petition] in this case, we are concerned in large part with original actions seeking new trials, release from confinement, or *vindication of fundamental civil rights.* Rather than presenting claims that have been passed on by two courts, they frequently raise heretofore unlitigated issues. As this Court has "constantly emphasized," habeas corpus and *civil rights actions* are of "fundamental importance . . . in our constitutional scheme" because they directly protect our most valued rights.

Id. at 827 (citations omitted; emphasis added). Similarly, Mr. Logan seeks to utilize the benefits of the adjudicatory system which the state created for the purpose of hearing and deciding employment discrimination cases. Mr. Logan seeks to vindicate an important civil right — the right to be free from unlawful discrimination in his employment.

The sum of the interests enumerated above constitutes a liberty interest protected by the due process clause.

II. Termination Of Mr. Logan's Employment Discrimination Claim Violates Equal Protection.

Termination of Mr. Logan's employment discrimination claim solely because the investigator failed to convene the fact finding conference within 120 days is the application of an irrational governmental classification. The Illinois Supreme Court interpreted section 8(b) of the FEPA in such a way that all claimants for whom the investigator does not schedule a fact finding conference within 120 days of filing will suffer

the complete loss of their statutory remedy for unlawful employment discrimination. The result is that claims filed at the same time, involving the same allegations, and pursued with equal diligence, will be heard or dismissed depending entirely on the irrational criterion of whether the investigator met the 120 day limit for convening the conference.

The consequences of being in one or the other class of claimants are striking. Claims of litigants in the disfavored class are extinguished with no evaluation while claims of litigants in the favored class receive decisions on the merits. Moreover, the FEPA provides that the latter class's decisions are subject to judicial review. *See supra* at 28.

The Equal Protection Clause of the Fourteenth Amendment requires that all governmental classifications meet a minimum standard of rationality. "At the minimum level, this Court consistently has required that legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives." *Schweiker* v. *Wilson,* 101 S.Ct. 1074, 1080 (1981). *See Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970).

The Illinois Supreme Court's application of the 120 day requirement to terminate charges of discrimination fails to meet the two express purposes of the FEPA: to protect persons from discrimination in employment and to protect employers from unfounded charges of discrimination. The classification furthers neither of these objectives, for each may be realized only through some evaluation of the merits of the charge. Whether the investigator schedules the fact finding conference within 120 days bears no relation to the merits. Indeed, the termination takes place prior to any evaluation of the strength of the charge. The classification thus violates equal protection because it "rests on grounds wholly irrelevant to the achievement of the State's objective." *McGowan* v. *Maryland,* 366 U.S. 420, 425 (1961).

It can hardly be argued that arbitrary termination of a category of charges furthers the goal of protecting workers from employment discrimination. Under a system in which a

claim may be extinguished before any evaluation of its merits, egregious instances of employment discrimination will go unremedied. The overriding legislative purpose is to give a remedy to victimized workers and to ensure that employers who are guilty of discriminatory practices are ordered to stop.[10] This can be accomplished only if cases are heard and decided.

The classification also fails to further the purpose of protecting employers from unfounded charges of discrimination. Whether the claimant has a fact finding conference within 120 days of filing his charge has nothing to do with whether the charge is well founded. His charge is terminated before anyone has had the opportunity to consider whether it is well founded. In *Lindsey* v. *Normet,* 405 U.S. 56 (1972), the Court held that Oregon's double-bond requirement in forcible entry and detainer appeals violated equal protection. The requirement was said to discourage unfounded appeals. The Court, however, concluded, "The claim that the double-bond requirement operates to screen out frivolous appeals is unpersuasive, for it not only bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond." *Id.* at 78. In *Rinaldi* v. *Yeager,* 384 U.S. 305 (1966) the Court ruled that a state violated equal protection by imposing the obligation to pay for an appeal transcript only on prison inmates. The Court stated that the classification the state created was not rationally related to the purpose of discouraging frivolous appeals. "By imposing a financial obligation only upon inmates of institutions, the statute inevitably burdens many whose appeals, though unsuccessful, were not frivolous, and leaves untouched many whose appeals may have been frivolous indeed." *Id.* at 310.

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[10] The FEPA's declaration of policy sets out important public policies underlying the goal of protecting employees from discriminatory practices:

> [D]enial of equal employment opportunity . . . with consequent failure to utilize the productive capacities of individuals to the fullest extent deprives a portion of the population of the State of earnings necessary to maintain a reasonable standard of living, thereby tending to cause resort to public charity and may

Like the classifications in *Lindsey* and *Rinaldi,* the classification in the instant case fails to separate those claims that are unfounded from those that are justified. Instead, it classifies claimants on a wholly irrelevant criterion: whether the fact finding conference is held on time. Indeed, the instant classification is even more offensive than those in *Lindsey* and *Rinaldi,* for unlike those classifications, it does not discourage the assertion of claims, but instead completely eliminates claims. The result is that utterly unfounded claims may be heard, decided and judicially reviewed, while just claims are discarded without the slightest examination.

In the Illinois Supreme Court's Opinion, application of the 120 day time limit on fact finding conferences so as to terminate charges prior to any evaluation of their merits apparently has a secondary purpose: the "just and expeditious resolutions of employment disputes." *Zimmerman Brush* (J.A. 34).[11] The classification fails to bear a rational relation even to this asserted purpose.[12]

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cause conflicts and controversies resulting in grave injury to the public safety, health and welfare . . . .

Ill. Rev. Stat. ch. 48, §851 (1979).

[11] The uncertainty exists because the Illinois Supreme Court speaks at length of the goals of an early fact finding conference, including "[t]he public interest in an expeditious resolution of disputes . . . ." *Zimmerman Brush* (J.A. 33). Mr. Logan, of course, takes no issue with the requirement of a fact finding conference as early in the dispute as possible. At issue, however, is the constitutionality of the requirement that the class of claimants that has not been provided an early fact finding conference must suffer an additional loss: the blanket and arbitrary dismissal of its claims. The Illinois Supreme Court's justification for this draconian application of the 120 day rule is less clear. The court at one point refers to the application as one of the "reasonable procedures to be followed upon a charge." *Zimmerman Brush* (J.A. 35). As demonstrated, however, the procedure is anything but reasonable as a means to meet the goals of the FEPA.

[12] The dissent of Justice Powell in *Schweiker* v. *Wilson,* 101 S.Ct. at 1085, joined by Justices Brennan, Marshall and Stevens, reasons, "When a legislative purpose can be suggested only by the ingenuity

Where the termination of the charge is not based on an evaluation of its merits or on the diligence of the claimant, employment disputes are not resolved justly or expeditiously, because they are not resolved. "Resolution" presupposes a conscious decision based on some rational criteria.[13] An inadvertent failure to schedule a timely fact finding conference does not result in the resolution of a dispute but merely in its termination. The employee loses his remedy for the discriminatory treatment he suffered. Conversely, the employer is not vindicated by a decision that it was not guilty of the charge of discrimination.

Even if the termination of a claim due to the investigator's error in scheduling can be characterized as a "resolution" of the case, it is certainly not a "just resolution." A just resolution should be based on either the merits of the claim or the diligence of either party in meeting his procedural obligations. Under the provision at issue,

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of a government lawyer litigating the constitutionality of a statute, a reviewing court may be presented not so much with a legislative policy choice as its absence." *Id.* at 1088. Accordingly, the Court should receive such hypotheses with "some skepticism," and "require that the classification bear a 'fair and substantial relation' to the asserted purpose. *See Royster Guano* v. *Virginia,* 253 U.S. 412, 415 (1920)." *Id.* The purpose at issue, the expeditious resolution of disputes, is just such a hypothesis, proposed by a lawyer defending the statute and adopted by the court below. Indeed, the government lawyers representing the Illinois Human Rights Commission have consistently argued that the Legislature intended neither that the statutory deadline should be mandatory nor that charges such as Mr. Logan's should be terminated. Because the legislative classification does not even meet the minimum standard of rational relation to the asserted purpose of expeditious resolution of disputes, *a fortiori* it fails to withstand the "marginally more demanding scrutiny," *id.*, that four members of the Court would apply.

[13] That the Illinois Legislature intended a conscious resolution of employment disputes is clear from the procedures set out in the FEPA requiring "for cause" decisions at every stage of the proceeding. *See supra* at 32.

employees who pursue their claims diligently may lose to employers who are guilty of the most blatant discriminatory practices. Moreover, the scheduling of the fact finding conference is wholly within the control of the Commission. As argued above, claimants are not even notified that a fact finding conference must be convened within 120 days of the filing of the charge. *See supra* at 13. In *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972), the Court, speaking through Justice Powell, identified as a "basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." There it was unjust and irrational to penalize certain illegitimate children for the "irresponsible liaisons" of their parents by denying them equal rights to make claims under Louisiana's workers' compensation laws. *Id.* at 175. Similarly, subjecting a class of charging parties in employment discrimination cases to the consequences of Commission mistakes is an unjust way of resolving employment disputes.

In *Weber,* the Court also decided that penalizing certain illegitimate children was an illogical and ineffectual method of deterring future potential parents from engaging in "irresponsible liaisons." *Id.* In the same way, penalizing diligent claimants for the scheduling mistakes of the Commission's investigators is an illogical and ineffectual method of insuring more expeditious treatment of future charges of employment discrimination. In order to promote that result, the consequences of the failure to schedule fact finding conferences on time would have to fall on the body charged with scheduling them — the Commission.

Furthermore, with respect to pending charges, the harsh application of the 120 day deadline does not act as an effective means of reducing processing time. The reason is that the legislation contains no time limits by which the Commission must ultimately dispose of the case. *See* Ill. Rev. Stat. ch. 48, §§858-859 (1979). As long as the Commission holds the fact finding conference within 120 days and issues a complaint within 180 days, it can take years before issuing its final order and decision.

Unlike a statute of limitations, the Illinois Supreme Court's application of the 120 day deadline does not serve to protect defendants from stale claims. The 120 day limit does not even come into operation unless a charging party has met the 180 day limitations period for filing his charge. The respondent is aware of the charge from the time of filing. In fact, in the instant case, the charge was filed just five days after the discriminatory conduct took place; 180 days had not yet elapsed when the Illinois Supreme Court issued its writ of prohibition and the charge was terminated. Seeking to preserve his remedy, Mr. Logan filed a second charge which stated the same facts. Despite the timeliness of the second charge, the Illinois Supreme Court barred the Commission from proceeding on it. The court said that to proceed "would frustrate the design of the law." *Zimmerman Brush* (J.A. 36).[14]

Even if the Illinois Supreme Court's application of the 120 day rule did serve the purpose of expeditious (if unjust) resolution of disputes, it would still violate equal protection, because it would accomplish the purpose in a patently arbitrary and irrational way. *See United States Railroad Retirement Board* v. *Fritz,* 101 S.Ct. 453, 460 (1980) ("The only remaining question is whether Congress achieved its purpose in a patently arbitrary or irrational way.").

This Court has found that it is irrational and arbitrary to single out a class, irrespective of the conduct of its members or the nature of their claims, and bar it from asserting claims simply to ease the government's burden of enforcing legal rights. In *Reed* v. *Reed,* 404 U.S. 71 (1971), the Court applied the rational relation standard to strike down a legislative classification by which men who applied for appointment as

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[14] The Illinois Supreme Court's application of the 120 day rule is also unlike a statute of limitations in that it terminates charges that have already been filed. Termination of such charges does not extinguish the mere ability to make a claim, but instead interferes with rights that persons have in claims that they have already made.

administrators were given preference over similarly situated women, without any determination on the merits of their respective applications. The legislative goal was said to be the reduction of probate courts' workloads. While the Court noted that this goal may be legitimate, it nevertheless ruled that elimination of a category of persons who are seeking a decision on their applications is not a rational means to accomplish it:

> Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question, however, is whether [the statute] advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not. To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment . . . .

Id. at 76. It is similarly arbitrary and similarly inconsistent with the command of the Equal Protection Clause to terminate charges on the basis of the haphazard failure to schedule timely fact finding conferences "merely to accomplish the elimination of hearings on the merits," and any resulting decrease in the backlog. *See Stanley* v. *Illinois,* 405 U.S. 645, 656 (1972) ("The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest . . . . But the Constitution recognizes higher values than speed and efficiency."); *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. at 175 ("[L]egal burdens should bear some relationship to individual responsibility or wrongdoing.").

Moreover, in the present context, speed is at best a secondary purpose in a larger scheme whose overriding purpose is the eradication of employment discrimination. In *Jimenez* v. *Weinberger,* 417 U.S. 628 (1974), this Court ruled that it violated the rational relation standard to establish a "blanket and conclusive exclusion" for the claims for social security

survivors' benefits of one subcategory of illegitimate children, simply to accomplish the secondary goal of reducing spurious claims:

> [I]t would not serve the purposes of the Act to conclusively deny them an opportunity to establish . . . their right to insurance benefits, and it would discriminate between two subclasses of afterborn illegitimates without any basis for the distinction since the potential for spurious claims is exactly the same as to both subclasses.

Id. at 636.

This Court reached a result similar to that in *Jimenez* in *Trimble* v. *Gordon*, 430 U.S. 762 (1977). The Court held unconstitutional the Illinois statute on intestate succession, which as interpreted by the Illinois Supreme Court, foreclosed the claims of illegitimate children against the estates of their fathers. The Court acknowledged that the classification of claimants did accomplish the purpose of "establishing a method of property disposition," *id.* at 770, but stated that the classification accomplished this minimal objective at the cost of denying the children the capacity to inherit. The Court noted that the same minimal objective could be accomplished as easily with a fairer rule. *Id.* at 771. In the instant case, it is not rational to achieve any minor advantage in speed and efficiency at the cost of denying the rights of charging parties and frustrating the goal of remedying discrimination. Moreover, the state could do considerably more to promote speed and efficiency simply by screening the charges when they are filed and dismissing the weak ones after a preliminary investigation.

This Court has ruled on numerous occasions that it violates equal protection for the state to capriciously or arbitrarily deny a class of persons the right to make valuable legal claims and defenses. In *Lindsey* v. *Normet*, 405 U.S. 56 (1972), this Court noted that a state need not provide appellate review to civil litigants, but stated:

> When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily

> denied to others without violating the Equal Protection Clause.

Id. at 77. In striking down the double-bond requirement in the Oregon forcible entry and detainer statute ("FED"), a unanimous Court found that it was an "arbitrary and irrational" discrimination against the class of FED appellants because it was a "substantial barrier to appeal faced by no other civil litigant." *Id.* at 79. *James* v. *Strange,* 407 U.S. 128 (1972), concerned a Kansas statute that provided that debts for using the services of a public defender were not subject to otherwise available statutory exemptions from execution. The Court held that the Equal Protection Clause required that these defenses could not be arbitrarily withheld from the affected class of debtors. *Id.* at 141. In *Stanley* v. *Illinois,* 405 U.S. 645 (1972), the Court observed that exclusion of unwed fathers from the group of persons who could assert parental rights in court denied them a procedural right that others could claim. The Court concluded that the law was "inescapably contrary to the Equal Protection Clause." *Id.* at 658. In the instant case, the Illinois Supreme Court has applied the statutory time limit for fact finding conferences in such a way that the class of persons to which Mr. Logan belongs is absolutely prevented from asserting a legal claim that would otherwise be available. The classification of those who can pursue their claims and those who lose them depends on the arbitrary criterion of whether an investigator, prior to any opportunity to evaluate the facts, schedules a fact finding conference on time. The classification does not depend on the merits of the cases of the class members or the diligence the members have exercised. This classification is irrational and should be found to violate equal protection.

CONCLUSION

For the foregoing reasons, appellant Laverne Logan submits that the judgment of the Illinois Supreme Court should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

Rules And Regulations Of The Fair Employment Practices Commission (1979)

Section 4.5. *Dismissal After Investigation* — If after investigation of a charge, the investigative findings indicate that the charge is not supported by substantial evidence or that the Commission lacks jurisdiction of the charge, and this indication is concurred in by the Commission's Executive Director or his designee, the Executive Director shall thereupon cause to be served upon the complainant a Notice of Dismissal. The Notice of Dismissal shall advise the complainant that the charge is recommended for dismissal, and shall state the ground upon which it is to be dismissed, and shall be accompanied by a copy of the written investigation report. The Notice shall further advise that the complainant may object to dismissal of the charge and obtain consideration of the matter by the full Commission, by serving a demand therefor upon the Commission within thirty (30) days of the date of the Notice. If no such timely demand is served by the complainant upon the Commission, the charge shall be deemed dismissed as of the expiration of said thirty-day period, and the parties shall be so notified. In the event the complainant files a timely demand for reconsideration as herein provided, the matter shall be reevaluated by the Commission's staff and submitted to the full Commission for determination. A complainant's timely demand for reconsideration under this Section may be accompanied by such statement and/or evidence as the complainant may feel supports the charge.

Section 4.7. *Commission Finding* — After investigation, the Commission's staff shall submit to the Commission each charge which the investigation indicates is supported by substantial evidence, or in which a complainant has filed a timely demand for reconsideration of a Notice of Dismissal as provided in Section 4.5 of these Rules and Regulations. If the Commission finds that it has jurisdiction of the charge and that there is substantial evidence to support the charge, it shall order that conciliation be attempted in accordance with

Article V of these Rules and Regulations. Otherwise, it may return the charge for further investigation, or order that the charge be dismissed. No charge shall be dismissed by the Commission under this Section unless the complainant has been afforded an opportunity to request reconsideration as provided in Section 4.5 of these Rules and Regulations.

Where the same or substantially identical charge has been filed with the U.S. Equal Employment Opportunity Commission, pursuant to 42 U.S.C. sec. 2000e *et seq.*, the Commission shall grant substantial weight to any findings reached by that agency in making its determination hereunder. In the event that a charge is ordered to conciliation or ordered dismissed, the Commission shall promptly serve notice of such action upon all parties.

Section 5.7. *Failure of Conciliation* — If conciliation fails to effect a settlement or dismissal of a charge as provided in this Article, the Commission shall issue against the respondent and cause to be served upon all parties a written complaint and notice of public hearing, in accordance with Article X of these Rules and Regulations.

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IN THE

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OCTOBER TERM, 1981

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v.

ZIMMERMAN BRUSH COMPANY,

Appellee.

ON APPEAL FROM THE ILLINOIS SUPREME COURT

BRIEF FOR APPELLEES ILLINOIS HUMAN RIGHTS COMMISSION, DELORES NEIGHBORS AND CONNIE VILLALBA.

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QUESTION PRESENTED

Whether the Fair Employment Practices Act conferred upon Mr. Logan a legitimate claim of entitlement to a determination on the merits of his timely filed charge of discrimination, whereby due process precludes the termination of Mr. Logan's interests based solely on the failure of the Fair Employment Practices Commission to convene a timely fact finding conference?

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BRIEF FOR APPELLEES ILLINOIS HUMAN RIGHTS COMMISSION, DELORES NEIGHBORS AND CONNIE VILLALBA.

SUMMARY OF ARGUMENT

The Fair Employment Practices Act creates a substantive entitlement for Mr. Logan to be free of employment discrimination on account of his physical handicap. The FEPA also contains a "for cause" standard for dismissing a timely filed charge of discrimination, as a complainant has the right to seek judicial review of an order of the Fair Employment Practices Commission dismissing a charge as non-meritorious. Ill. Rev. Stat. 1979, ch. 48, § 860. The failure of the Commission to convene a timely fact finding conference cannot deprive Mr. Logan of his legitimate claim of entitlement to a determination on the merits of his timely filed charge.

This Court has utilized the presence of a "for cause" standard for deprivation of a statutory entitlement as indicative of whether a legitimate claim of entitlement has been created.

Memphis Light, Gas & Water Div. v. *Craft,* 436 U. S. 1, 56 L. Ed. 2d 30, 98 S. Ct. 1554(1978). When state law provides that a benefit can only be terminated for cause, a person has a legitimate claim of entitlement to it within the protection of the Due Process Clause. *Id.* at 11-12. As Mr. Logan's timely charge can only be dismissed "for cause", he is entitled to attempt to establish before the Commission that an unfair employment practice was committed, and that he is eligible for the substantial relief available to an aggrieved person under the FEPA. *Goldberg* v. *Kelly,* 397 U. S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011(1970).

This Court has said that a cause of action created by the State is arguably a "species of 'property' protected by the Due Process Clause." *Martinez* v. *California,* 444 U. S. 277, 281-82, 62 L. Ed. 2d 481, 100 S. Ct. 553(1980). Although the State can create defenses to a cause of action, this Court said that the action of the State cannot be "wholly arbitrary or irrational." *Id.* at 282. The termination of Mr. Logan's cause of action through no fault of his own and without any consideration of the merits because of the administrative error is wholly arbitrary and irrational.

As the FEPA conferred upon Mr. Logan a property interest in his cause of action, Mr. Logan's property interest cannot be extinguished by a statutory procedure that does not afford due process. *Arnett* v. *Kennedy,* 416 U. S. 134, 40 L. Ed. 2d 15, 94 S. Ct. 1633(1974).

Due process required that Mr. Logan have the opportunity to attempt to establish before the Commission that his charge is meritorious and that he is eligible for the substantial relief available in the FEPA.

ARGUMENT

THE FAIR EMPLOYMENT PRACTICES ACT CONFERRED UPON MR. LOGAN A LEGITIMATE CLAIM OF ENTITLEMENT TO A DETERMINATION ON THE MERITS OF HIS TIMELY FILED CHARGE OF EMPLOYMENT DISCRIMINATION, AND DUE PROCESS OF LAW REQUIRES THAT MR. LOGAN'S CHARGE CANNOT BE EXTINGUISHED WITHOUT CONSIDERING THE MERITS OF HIS CHARGE.

The Fair Employment Practices Act (hereinafter "FEPA") creates an important substantive interest that Mr. Logan and other physically handicapped persons shall be free from employment discrimination. To effectuate this interest the Illinois General Assembly provided that the Fair Employment Practices Commission (hereinafter "Commission") can order that an aggrieved person be hired or reinstated and be paid for back pay and attorney's fees, as well as requiring an employer to cease the discriminatory practices. Ill. Rev. Stat. 1979, ch. 48, § 858.01(c). The importance of the interest created to be free from employment discrimination is evident from the FEPA, which says that such discrimination:

> .... [D]eprives a portion of the population of the State of earnings necessary to maintain a reasonable standard of living, thereby tending to cause resort to public charity and may cause conflicts and controversies resulting in grave injury to the safety, health and welfare: ... Ill. Rev. Stat. 1979, ch. 48, § 851.

Also determinative of whether Mr. Logan has a legitimate claim of entitlement to a determination of the merits of his charge under the FEPA is the fact that the Illinois General Assembly provided complainants with the right of obtaining judicial review when the Commission dismisses a charge as non-meritorious either after initial investigation or subsequently after an evidentiary hearing. Ill. Rev. Stat. 1979, ch. 48, § 860.

By providing an adjudicatory system in which an aggrieved person's timely filed charge of discrimination can only be dismissed "for cause," the Illinois General Assembly created a legitimate claim of entitlement in Mr. Logan to receive a determination of the merits of his charge. As the FEPA conferred upon Mr. Logan a property interest in his cause of action, Mr. Logan cannot be deprived of that interest, through no fault of his own, because of the failure of the Commission to comply with the requirement in the FEPA that it convene a fact finding conference within 120 days. Ill. Rev. Stat. 1979, ch. 48, § 858(b).

It is settled that whether a property interest has been created is decided by reference to "an independent source such as state law." *Memphis Light, Gas & Water Div.* v. *Craft,* 436 U. S. 1, 56 L. Ed. 2d 30, 98 S. Ct. 1554 (1978); *Board of Regents* v. *Roth,* 408 U. S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). In *Board of Regents* v. *Roth* this Court said that:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. . . . *Id.* at 577.

For a person to have a property interest in a benefit, state law must provide him with a legitimate claim of entitlement to the benefit as opposed to a mere unilateral expectation of it. *Id.* at 577. This Court has utilized the presence of a "for cause" standard for deprivation of a statutory entitlement as indicative of whether a legitimate claim of entitlement has been created. *Memphis Light, supra* at 11-12; *Bishop* v. *Wood,* 426 U. S. 341, 48 L. Ed. 2d 684, 96 S. Ct. 2074 (1976). In *Memphis Light,* this Court said that, as the utility service could only be terminated for cause, the respondents could "assert a 'legitimate claim of entitlement' within the protection of the Due Process Clause." *Id.* at 11-12.

As the FEPA provides a complainant with the right to obtain judicial review of an order of the Commission dismissing his charge after initial investigation for a lack of substantial evidence or of a determination by the Commission following a hearing that the complainant has not established his charge by a preponderance of the evidence, it is clear that a complainant's properly filed charge can only be dismissed "for cause." Providing a complainant with the right of judicial review of a determination by the Commission that his charge is non-meritorious is in marked contrast to the situation in *Bishop* v. *Wood, supra,* in which state law provided that a public employee could be terminated at will and did not create any right for an employee to obtain judicial review. In *Goldberg* v. *Kelly,* 397 U. S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970) this Court held that the welfare recipients had a claim of entitlement to welfare payments stemming from the statute defining eligibility for benefits, and that they had a right to a hearing in which they could attempt to show that they were within the statutory terms of eligibility. Similarly, the FEPA provides that Mr. Logan can get his job back along with payment of back pay and attorney's fees if he can establish that he was discriminated against on account of his handicap. As the General Assembly also provided Mr. Logan with the right to obtain judicial review if the Commission found his charge to be non-meritorious, he certainly has a legitimate claim of entitlement to have the Commission adjudicate the merits of his charge.

As construed by the Illinois Supreme Court the FEPA provides the Commission with the unreviewable power to act arbitrarily in that it can extinguish a complainant's rights by simply not holding a fact finding conference within 120 days, while if it dismisses a charge of discrimination as non-meritorious the complainant can obtain review in the courts. The Commission has never contended that it possessed such an unreviewable power to extinguish the rights of a complainant such as Mr. Logan who timely filed a charge of discrimination.

Zimmerman Brush Co. v. *Fair Employment Practices Commission,* 82 Ill. 2d 99, 411 N. E. 2d 277 (1980). The erroneous scheduling by the investigator of the instant fact finding conference five days beyond the 120 day period cannot deprive Mr. Logan of the important substantive interest conferred upon him by the FEPA to be free of discrimination in employment on account of his physical handicap with vindication of that interest through an adjudicatory system in which his properly filed charge can only be dismissed for cause.[1] Mr. Logan's cause of action pursuant to the FEPA constitutes a property interest, which cannot be extinguished under the Due Process Clause without an opportunity establish that he has been a victim of discrimination and is entitled to the statutory relief available in the FEPA.

In *Martinez* v. *California,* 444 U. S. 277, 281-82, 62 L. Ed. 2d 481, 100 S. Ct. 553 (1980), this Court said that a cause of action created by the State is arguably a "species of 'property' protected by the Due Process Clause." Although the State can create defenses to a cause of action it created, this Court said that the action of the state cannot be "wholly arbitrary or irrational." *Id.* at 282. The termination of Mr. Logan's timely charge through no fault of his own without any bearing on the merits of his charge, because the Commission convened the fact finding conference five days late, is wholly arbitrary and irrational. The dismissal of Mr. Logan's charge without any determination of the merits and without any fault on his part neither protects employers from unfounded charges of discrimination nor leads to the just resolution of disputes. Convening the fact finding conference beyond 120 days does not even affect the potential financial burden upon Zimmerman Brush Company in the event of an adverse finding that it discriminated against Mr. Logan. On the other hand Mr.

[1] The Illinois General Assembly has already made the holding of a fact finding conference discretionary by providing in the Human Rights Act, which encompasses the former FEPA, that the Department "may conduct a fact-finding conference." Ill. Rev. Stat. 1980 Supp., ch. 68, § 7-102(c)(3).

Logan is deprived of his cause of action under the FEPA and the opportunity to use the adjudicatory system to establish that he was discriminated against and is entitled to the substantial relief available to a victim of discrimination under the FEPA.

As the FEPA conferred upon Mr. Logan a property interest in his cause of action, Mr. Logan's property interest cannot be extinguished by a statutory procedure which does not afford due process. *Arnett* v. *Kennedy,* 416 U. S. 134, 40 L. Ed. 2d 15, 94 S. Ct. 1633 (1974). In *Arnett* a six member majority of the Court rejected the view that a statute which confers a property interest can also limit the statutory procedures for deprivation of the interest created without analyzing the adequacy of such procedures in constitutional terms. As the mandatory requirement in the FEPA that a fact finding conference be convened within 120 days permits the termination of Mr. Logan's property interest in his cause of action without any fault on his part and without any connection to the merits of his charge, it is violative of due process.

Due process requires that Mr. Logan have the opportunity to attempt to establish before the Commission that his charge is meritorious, and that he is entitled to the relief available to prevailing complainants under the FEPA. The FEPA creates a legitimate claim of entitlement for a complainant to have the Commission adjudicate his charge on the merits and to seek judicial review of that determination. The failure of the Commission to convene a fact finding conference within 120 days cannot, consistent with due process, deprive Mr. Logan, through no fault of his own, of the right to present evidence before the Commission and receive an adjudication of the merits of his charge, with the subsequent right to judicial review of an adverse determination.

Mr. Logan argues that had the Commission included in the Notice of Fact Finding Conference notice that the 120 day period was mandatory and that failure to comply would require dismissal of his charge, then the dismissal of his charge because of the error by the Commission would not violate due process. The inclusion of such additional notice, however, does not alter the fact that a complainant who files a timely charge can nevertheless be deprived of his legitimate claim of entitlement to a determination on the merits of his charge solely because of the failure of the Commission to comply with the FEPA. Having conferred a property interest upon a complainant in his cause of action under the FEPA, a failure by the Commission to perform its duty cannot deprive a complainant of his right to a consideration of the merits of his charge.

CONCLUSION

For the foregoing reasons, the appellees, Illinois Human Rights Commission, Delores Neighbors and Connie Villalba, submit that the decision of the Illinois Supreme Court should be reversed.

Respectfully submitted,

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BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

ARGUMENT

The answers of appellee Zimmerman Brush Company ("the Company") to the questioinnaire propounded by the Illinois Fair Emloyment Practices Commission ("FEPC") show that the Company has a defense on the merits to Laverne L. Logan's complaint (J.A. 9-11). The Company knew of Mr. Logan's handicap when it hired him, and made efforts to accommodate him by transferring him to another position when it became apparent that he could not handle the physical requirements of his first job (J.A. 10). Unfortunately, these efforts were unavailing, and Mr. Logan was terminated (J.A. 11). When asked to submit to the FEPC a statement of its position on Mr. Logan's charge, the Company stated that it had made successful efforts to hire and help handicapped employees, and had worked with several organizations in these efforts (J.A. 10).

Thereafter, on the advice of special labor counsel, the Company decided not to defend on the merits, but instead embarked upon a legal battle to dismiss Mr. Logan's complaint and prevent the FEPC from further exercising jurisdiction over the charge. That battle has resulted in the expenditure of attorneys' fees which are enormous in relation to the value of the case which Mr. Logan has against the Company, especially when considered in the light of a meritorious defense. Further, the Illinois Human Rights Act (Ill.Rev.Stat. ch. 68, §1-101 *et seq.* (1980 Supp.)), which became effective on July 1, 1980, makes the convening of a fact-finding conference discretionary rather than mandatory, thus drastically limiting the ef-

fect that the Illinois Supreme Court's ruling in this case can have.

In view of these considerations, the Company respectfully states that it has elected not to incur further legal expenses briefing issues which do not go to the merits of the controversy.

CONCLUSION

For the foregoing reasons, appellee Zimmerman Brush Company requests that the judgment of the Illinois Supreme Court be affirmed, or, in the alternative, that the appeal be dismissed.

Respectfully submitted,

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This Supplemental Brief is filed by Rudnick & Wolfe pursuant to the request of this Court.

QUESTIONS PRESENTED

The Supreme Court of Illinois construed Section 8(b) of the Illinois Fair Employment Practices Act as requiring that a discrimination charge be automatically dismissed unless the state agency administering the Act held a hearing on the charge within 120 days of its filing. The questions presented are:

1. Whether Section 8(b), as construed, violated the federal due process and equal protection rights of a complainant whose charge was not heard within 120 days of filing because of the negligence of the state agency.

2. Whether reinstating the complainant's discrimination charge against his employer, as a means of remedying the state agency's negligence, is an appropriate exercise of the appellate jurisdiction of this Court.

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> "The statutory scheme here was to provide, through administrative and judicial channels, a means of relief from discriminatory employment practices. The legislature could establish reasonable procedures to be followed upon a charge, and the observance of them here did not violate [Logan's] constitutional rights."

82 Ill.2d at 108; 411 N.E.2d at 282 (1980).

SUMMARY OF ARGUMENT

The State of Illinois can place reasonable limitations on a state-created cause of action for employment discrimination based on physical handicap. Since whatever property and liberty interests Logan claims to have were created by state law, not federal law, this Court must look to the Illinois Supreme Court's decision to determine whether Logan's right to a cause of action against the Company came within the definition of "property" or "liberty." The Illinois Supreme Court held that the Commission's failure to convene a timely fact-finding conference on Logan's charge required the automatic dismissal of that charge in view of the underlying policies, stated goals and mandatory language of the FEPA. This construction of Section 8(b), binding on this Court, means that under Illinois law, Logan was not guaranteed a right to prosecute his FEPC charge unless the Commission performed its statutory duty, which it failed to do. Even if some causes of action can be considered "property" under this Court's decision in *Martinez v. California*, 444 U.S. 277, 100 S.Ct. 553 (1980), Logan's interest in his Illinois FEPA charge cannot, because the 120-day conference requirement of Section 8(b), and the automatic dismissal which results when that requirement is not met, are important aspects of the State's

definition of the interest created under the FEPA. The requirements of Section 8(b) applied with equal force to each and every complainant who filed an FEPA charge while that statute was in effect. Logan has therefore failed to state a violation of his federal due process and equal protection rights.

Even if a property interest is assumed to exist, Logan is not entitled to have his cause of action against the Company reinstated before the Commission. The Illinois Supreme Court has recognized that under Illinois law, employers charged with employment discrimination have certain rights, including the right to expect the Commission to follow statutory procedures on a charge. Reinstating Logan's charge would impermissably shift the burden for the Commission's negligence to the Company, in contravention of express policies embodied in the FEPA and with no apparent justification under the Fourteenth Amendment. Reinstatement can only be accomplished by invalidating Section 8(b), a statute since repealed, amended and reenacted as part of a comprehensive Human Rights Act, as repugnant to the United States Constitution, a drastic and unnecessary result. Under this Court's recent decision in *Parratt v. Taylor,* ..... U.S. ....., 101 S.Ct. 1908 (1981), a postdeprivation remedy can satisfy due process requirements when a deprivation occurs as the result of a state employee's random and unauthorized negligence. Several different remedies against the Commission may be available to Logan under Illinois law, but Logan has not chosen to pursue any of them. Logan has therefore not been deprived of property "without due process of law."

ARGUMENT

I. Logan Was Not Deprived of Property or Liberty Within the Meaning of the Fourteenth Amendment, Because Logan's Rights Under the Illinois Fair Employment Practices Act Were Conditioned on a Timely Conference, and No Such Conference Was Held.

This Court has recently reaffirmed that it has no supervisory jurisdiction over state courts, and that its role in reviewing state court judgments is confined to evaluating those judgments "in relation to the Federal Constitution." *Chandler v. Florida,* ..... U.S. ....., ..., 101 S.Ct. 802, 807 (1981). Thus, the issue properly before the Court on this appeal is not the wisdom of the Illinois legislature in enacting Section 8(b) of the Fair Employment Practices Act, nor the correctness of the Illinois Supreme Court's decision construing that statute; the questions is whether that statute, as construed, violated Laverne Logan's rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution.

An analysis of the Illinois Supreme Court's decision is pertinent, however, to an analysis of whether a property or liberty interest arose under Illinois law in connection with Logan's charge of employment discrimination because, in order to invoke the federal due process and equal protection clauses, Logan must show that he was deprived of property or liberty under color of state law. And, as this Court has explained, property interests "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure benefits and that support claims of entitlement to those

benefits." *Parratt v. Taylor,* ..... U.S. ....., ..., 101 S.Ct. 1908, 1910 n.1 (1981); *Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701 (1972). Logan does not contend that his right to be free from discrimination in employment on the basis of his physical handicap arises from any source other than state law (Brief for Appellant at 26).

In *Martinez v. California,* 444 U.S. 277, 100 S.Ct. 553 (1980), the survivors of a young girl murdered by a parolee sued state parole officials, alleging that their negligent decision to release the parolee despite his known dangerous propensities resulted in the girl's death. A state statute conferred on the officials complete immunity from state-law claims for injuries resulting from their parole determinations. The plaintiffs contended that by barring their state-law cause of action against the parole officials, the state immunity statute violated the Fourteenth Amendment to the United States Constitution. In upholding the California statute, this Court noted:

> "Arguably, the cause of action for wrongful death that the State has created is a species of 'property' protected by the Due Process Clause. On that hypothesis, the immunity statute could be viewed as depriving the plaintiffs of that property interest insofar as they seek to assert a claim against parole officials."

444 U.S. at 281-82, 100 S.Ct. at 557. Both Logan and the Commission rely on the first sentence quoted above to support their position that Logan's right to a cause of action against the Company was "property" under Illinois law. Such reliance is misplaced when the quoted language is read in conjunction with the Court's footnote to the same passage:

> "It is arguable, however, that the immunity defense, like an element of the tort claim itself, is merely one aspect of the State's definition of that property interest. Recently, in considering a lawyer's claim of immunity in a state malpractice action, we noted that 'when state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law.' "

444 U.S. at 282 n. 5; 100 S.Ct. at 557 n. 5 (citations omitted). The decision of the Illinois Supreme Court in this case strongly supports the conclusion that the 120-day conference requirement of Section 8(b) is merely one aspect of the State's definition of the property interest created by its Fair Employment Practices Act.

The Illinois Fair Employment Practices Act ("FEPA") first became law in 1961. As originally enacted, Section 3 of the FEPA prohibited employment discrimination on the basis of race, color, religion, national origin or ancestry. Ill. Rev. Stat. ch. 48, §853 (1961). In 1975, Section 3 was amended to include "physical or mental handicap unrelated to ability" as a protected basis. Ill. Rev. Stat. ch. 48, §853 (1975).

Illinois thus chose to join the thirty-seven other states,[1] and the District of Columbia, which have enacted statutes prohibiting discrimination against handicapped persons

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[1] Alaska, California, Colorado, Connecticutt, Florida, Georgia, Hawaii, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

in the private work force. The various laws in these states differ greatly in both substance and procedure.[2]

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[2] *See* Alaska Stat. §§18.80.010—18.80.300 (1974 & Supp. 1980); Cal. Gov't Code §§12900—12996 (West 1980); Colo. Rev. Stat. §24-34-301 *et seq.* (1980 Cum. Supp.); Conn. Gen. Stat. Ann. §§46a-51—46a-99 (West Supp. 1981); Fla. Stat. Ann. §§23.161—23.167 (West Supp. 1981); Ga. Code Ann. §§66-501—66-506 (Supp. 1981); Haw. Rev. Stat. §§378-1—378-38 (1976 & Supp. 1980); Ind. Code Ann. §22-9-1-1 *et seq.* (Burns 1974 & Supp. 1980); Iowa Code Ann. §§601A.1—601A.17 (West 1975 & Supp. 1981-82); Kan. Stat. Ann. §44-1001 *et seq.* (1973 & Supp. 1979); Ky. Rev. Stat. §§207.130—207.240 (1977 & Supp. 1980); La. Rev. Stat. Ann. §§46.2251—46.2256 (West Supp. 1981); Me. Rev. Stat. Ann. tit. 5, §4551 *et seq.* (West 1979 & Supp. 1980-81); Md. Ann. Code art. 49A, §§1-28 (1979); Mass. Gen. Laws Ann. ch. 149, §24K (West Supp. 1981); Mich. Comp. Laws Ann. §37.1101 *et seq.* (West Supp. 1981); Minn. Stat. Ann. §§363.01—363.14 (West 1966 & Supp. 1981); Mo. Ann. Stat. §§296.010—296.070 (Vernon Supp. 1981); Mont. Rev. Code Ann. §§64-301—64-330 (Cum. Supp. 4 pt.1 1977); Neb. Rev. Stat. §§48-1101—48-1125 (1978 & Supp. 1980); Nev. Rev. Stat. §§613.310—613.430 (1979); N. H. Rev. Stat. Ann. §§354-A:1—354-A:14 (1966 & Supp. 1979); N.J. Stat. Ann.§§10:5-1—10:5-38 (West 1976 & Supp. 1981); N. M. Stat. Ann. §§28-1-1—28-1-14 (1978 & Supp. 1981); N.Y. Exec. Law §§290-291 (McKinney 1972 & Supp. 1980); Ohio Rev. Code Ann. §§4112.01—4112.99 (Page 1980); Or. Rev. Stat. §§659.400—659.435 (1979); Pa. Stat. Ann. tit. 43, §§951—963 (Purdon 1964 & Supp. 1980); R.I. Gen. Laws §§28-5-1—28-5-39 (1979 & Supp. 1980); Tenn. Code Ann. §§8-50-103, 8-50-104 (1980); Tex. Human Resources Code Ann. tit. 8, §§121.001—121.009 (Vernon 1980); Utah Code Ann. §§34-35-1—34-35-8 (1974 & Supp. 1979); Vt. Stat. Ann. tit. 21, §498 (1979); Va. Code §40.1-28.7 (1981); Wash. Rev. Code Ann. §§49.60.010—49.60.320 (1962 & Supp. 1981); W. Va. Code §§5-11-1—5-11-19 (1979 & Supp. 1981); Wis. Stat. Ann. §§111.31—111.37 (West 1974 & Supp. 1981).

Three additional states prohibit such discrimination only in public employment;[3] eight others do not prohibit employment discrimination against the handicapped at all.[4]

In interpreting the 120-day conference requirement contained in Section 8(b) of the FEPA as mandatory, the Supreme Court of Illinois examined the statutory language "within the context of the entire statute, looking particularly to the purpose of the legislation." *Zimmerman Brush Company v. Fair Employment Practices Commission,* 82 Ill.2d 99, 103, 411 N.E.2d 277, 280 (1980) (J.A. 30-31). The Illinois Supreme Court viewed the case against the background of earlier decisions in which the court had unequivocally held that a similar time requirement, contained in another section of the FEPA, was intended by the legislature to be mandatory. In *Springfield-Sangamon County Regional Plan Commission v. Illinois Fair Employment Practices Commission,* 71 Ill.2d 61, 373 N.E.2d 1307 (1978), the court had been called on to construe Section 8(c) of the FEPA, which at the time of the filing of the charge in that case provided:

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[3] Alabama (*See* Ala. Code tit. 21, §21-7-8 (1975)); Arkansas (*See* Ark. Stat. Ann. §§82-2901—82-2907 (Supp. 1981)); and Mississippi (*See* Miss. Code Ann. §43-6-15 (Supp. 1979)).

[4] Arizona (*See* Ariz. Rev. Stat. Ann. §41-1463 (West Supp. 1980-81)), Delaware (*See* Del. Code tit. 19, §711 (1974)). Idaho, North Dakota, Oklahoma, South Carolina, South Dakota (*See* S.D. Codified Laws §20-13-10 (1979)), and Wyoming. North Carolina's Equal Employment Practices Act does not prohibit discrimination, but declares it to be against "public policy." N.C. Gen. Stat. §§143.422-1—143.422-3 (1978); *accord, Spagnuolo v. Whirlpool,* 467 F.Supp. 364 (W.D.N.C. 1979).

> "Whenever a charge of an unfair employment practice has been properly filed, the Commission, within 180 days thereof, shall either issue and serve a complaint in the manner and form set forth in this Section or shall order that no complaint be issued. Any such order shall be duly served upon the complainant and the respondent."

Ill. Rev. Stat. ch. 48, §858(c) (1967) (current version at Ill. Rev. Stat. ch. 68, §7-102(G) (Supp. 1980)). The court in *Springfield-Sangamon* ruled that the 180-day period requirement "was intended to ensure expeditious action on behalf of the [Commission], and must be considered mandatory." 71 Ill.2d at 68, 373 N.E.2d at 1310. In reaching this conclusion, the court noted that delays by the Commission "would tend to hamper the remedial and reconciliatory procedures which underlie the very purpose of the Fair Employment Practices Act," 71 Ill.2d at 68, 373 N.E.2d at 1310, and analogized the 180-day requirement to a statute of limitations. *Id.*

In 1979, the Illinois Supreme Court issued a writ of prohibition against the Commission in the case of *Board of Governors v. Illinois Fair Employment Practices Commission*, 78 Ill.2d 143, 399 N.E.2d 590 (1979). Relying on *Springfield-Sangamon*, the court held that the Commission could not proceed on a complaint which it had filed after the expiration of the 180-day period.

Thus, for nearly two years before Logan filed his charge in this case, the clear state of the law in Illinois was that inaction by the Commission could result in the forfeiture of a complainant's rights to have his charge investigated and evaluated. In *Springfield-Sangamon*, the court addressed this very issue:

> "Although an aggrieved individual who has suffered discrimination should not be deprived of the

> benefits of the Act because of administrative failures, we must also consider that those charged under the Act have the right to a determination of the validity of the charge within the time limitations of the statute. In the event of a finding against a respondent the impact of the administrative order may be severe. In this case, the order was entered March 29, 1973, almost 5 years after the alleged unfair employment practice. This period of time would have been substantially shortened and the amount of money the respondents would have been required to pay [the complainant] as accrued salary and interest would have been considerably less if [the complainant] and the [Commission] had complied with the statute. The respondents have the right to expect that the impact of such administrative orders will be minimized by compliance with the statutory time limitations."

71 Ill.2d at 73, 373 N.E.2d at 1312.

In Logan's case before the Illinois Supreme Court, the Commission argued that the *Springfield-Sangamon* rationale should not be applied to Logan's case, where the charge was filed five days after termination of employment and the conference convened five days after the 120-day limitation period had run. (J.A. 32). Whatever the merits of this position may be as a matter of raw justice or social policy, the Illinois Supreme Court firmly rejected it as a matter of state law:

> "We deem that this contention that the conference should be allowed to proceed beyond the 120-day period interprets *Springfield-Sangamon* too narrowly and ignores the goals underlying section 8(b)."

82 Ill.2d at 105, 411 N.E.2d at 281. (J.A. 32).

Noting that Section 8(b) had been enacted after the *Springfield-Sangamon* decision had construed the word "shall" in Section 8(c), the court held:

> "We consider that the legislature's use again of the term 'shall' in section 8(b) indicates an intention that the prescription of a 120-day period be given a manadtory construction. . . . It is reasonable to consider that under these circumstances the legislature intended to accept the prior construction of 'shall.'"

82 Ill.2d at 104-05; 411 N.E.2d at 280-81. (J.A. 21-32). This interpretation of state law by the highest court of the state is binding on this Court. *Hortonville Joint School District v. Hortonville Education Association,* 436 U.S. 482. 96 S.Ct. 2308 (1976); *Henry v. Mississippi,* 379 U.S. 443, 85 S.Ct. 564 (1965). The Illinois Supreme Court's opinion holds that the Commission's failure to act on a complainant's charge within statutory time limitations results in the automatic dismissal of that charge. Thus, the 120-day conference requirement of Section 8(b) is, in effect, a condition precedent to an individual complainant's rights under the FEPA.

Logan's argument that once filed, his charge could only be dismissed "for cause," ignores the holding of the Illinois Supreme Court that a charge must be automatically dismissed if the Commission fails to comply with statutory time limitations. 82 Ill.2d at 106, 411 N.E.2d at 282. If a charge can be *automatically* dismissed, then obviously it can be dismissed for reasons other than "for cause."

Logan therefore had no property interest in his FEPA charge unless and until a timely conference was held. If it is true, as Logan contends, that "the presentation of an FEPA case is controlled entirely by the complainant," (Brief for Appellant at 28 n.6) then it would be the complainant's responsibility to make sure that the Commission scheduled the fact-finding conference within 120

days, which Logan did not do.[5] If that is not the case, then the only logical alternative is that Illinois has chosen, for various policy reasons underlying the statute, to place the potential rights of employment discrimination complainants in the hands of the Commission, which is the state agency charged with the prompt administration of the FEPA.

Because no timely hearing was held, Logan's interest never rose to the level of a statutory entitlement such as those involved in the cases he cites. In *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011 (1970), recipients' welfare benefits could not be terminated by the state without "cause"; in *Goss v. Lopez,* 419 U.S. 565, 95 S.Ct. 729 (1973), state law required "grounds" before a student could be suspended from school; in *Barry v. Barchi,* 443 U.S. 55, 99 S.Ct. 2642 (1979), state law required a finding of "at least negligence" before a horse trainer's license could be revoked; in *Arnett v. Kennedy,* 416 U.S. 134, 94 S.Ct. 1633 (1974), a public employee could only be terminated "for cause" under state law. As noted above, Logan's citation of these authorities begs the issue, because Illinois law not only allows but *requires* "automatic dismissal" of FEPA charges for a reason

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[5] Although the soundness or fairness of Illinois law is not an issue properly before this Court, it is interesting to note this Court's recent decision in a somewhat analogous Title VII context. In *Mohasco v. Silver,* 447 U.S. 807, 100 S.Ct. 2486 (1980), a claimant's EEOC charge was held to be time-barred for failure to file within the statutory time limitation for deferral states, despite the existence of prior EEOC regulations and lower court case law which had interpreted the limitation in a manner which supported the claim of timeliness. This Court held that it was not unfair to require pro se complainants to observe the statutory requirements which it was then construing for the first time.

other than "for cause:" the failure of the Commission to meet statutory time limitations enacted to effectuate the FEPA's purposes.

Logan correctly asserts that his right to procedural due process arises, not from state law, but from the federal Constitution. He then argues that Illinois should not be allowed to "simultaneously create protected interests and limit those interests by procedures that violate due process." Brief for Appellant at 32. This reasoning is faulty in two respects.

First, Logan was not deprived of "property". Procedural due process applies only where there is a deprivation of "liberty" or "property" within the meaning of the Fourteenth Amendment. In *Paul v. Davis,* 424 U.S. 693, 96 S.Ct. 1155 (1978), the Court reviewed various types of interests which have been found to constitute "liberty" or "property". The Court then noted:

> "In each of these cases, as a result of the state action complained of, *a right or status previously recognized by state law* was distinctly altered or extinguished. It was this alteration, officially removing the interest from the *recognition and protection previously afforded by the State,* which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment."

424 U.S. at 711; 96 S.Ct. at 1165 (emphasis added). Since the Illinois Supreme Court ruled that Logan's FEPA charge was dependent on the timely convening of a fact-finding conference, the statute which gave Logan the right to file a charge did not, in and of itself, afford Logan any protection from the negligent failure of the Commission to convene the conference. When the state does not vouchsafe an individual's right

or interest, no "liberty" or "property" interest has been created within the meaning of the Fourteenth Amendment. *Cf. Paul v. Davis,* 424 U.S. 693, 96 S.Ct. 1155 (1978) (no legal guarantee under state law of present enjoyment of reputation). Logan cannot claim a right to have the Commission proceed on his charge despite the late scheduling of the conference because the decision of the Illinois Supreme Court is directly to the contrary.

Second, the facts of this case preclude a need to constitutionally analyze "the adequacy of *statutory procedures for deprivation* of a statutorily created property interest," *Arnett v. Kennedy,* 416 U.S. 134, 167, 94 S.Ct. 1633, 1650-51 (1974) (Powell, J., concurring) (emphasis added.) Logan was not deprived of any property interest *pursuant* to statutory procedures; it was the Commission's negligent failure to follow the mandated statutory procedures which resulted in Logan's charge being dismissed.[6] It would be a singularly inappropriate exercise of the appellate jurisdiction of this Court to hold a state statute unconstitutional because, in one isolated instance, a state employee negligently failed to follow that statute. *Cf. Parratt v. Taylor,* ..... U.S. ....., ..., 101 S.Ct. 1908, 1918 (Powell, J., concurring) (negligent acts by state officials do not constitute deprivations of property within the meaning of the Fourteenth Amendment). Here, as in *Paul v. Davis,* the argument advanced by the

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[6]All of the parties to this appeal agree that the Commission's failure to schedule a fact-finding conference within 120 days was negligent. *See* Brief for Appellant at 4; Brief for Appellees Illinois Human Rights Commission, *et al.* at 6 (scheduling was "erroneous"); Brief for Congress of Organizations of the Physically Handicapped *et al.* as *Amicus Curiae* at 6.

party invoking the due process clause "would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the Fourteenth Amendment." 424 U.S. at 699; 96 S.Ct. at 1159.

Equal protection analysis is likewise inapplicable to this case, both because no property or liberty interest existed and because the 120-day requirement of Section 8(b) applied equally to all FEPA claimants. As his only means of invoking the equal protection clause, Logan argues, in effect, that Section 8(b) creates two classes of complainants: those for whom the Commission convenes a conference within 120 days of the filing of a charge and those for whom the Commission fails to do so. Brief for Appellant at 41-42. This strained construction of the statute finds no support in the Illinois Supreme Court's opinion below. No such distinctions are created by the FEPA itself or by its lawful application. The statute cannot be said to create a class of claimants whose conferences are not timely convened, because its express mandate is that such conferences *be* convened. Logan does not represent any class defined by or arising out of the application of state law; to the contrary, he is an individual victim of a state agency's failure to follow controlling state law.

Unlike the double-bond requirement in forcible entry and detainer appeals which was the subject of this Court's analysis in *Lindsey v. Normet*, 405 U.S. 56, 92 S.Ct. 862 (1972), the 120-day conference requirement of Section 8(b) does not label any charge unfounded. The Court found in *Lindsey v. Normet* that the double-bond requirement drew a distinction based on whether potential appellants could afford to post the bond. Section

8(b) draws no distinctions between claimants who have filed FEPA charges. Notwithstanding Logan's contention that the 120-day requirement is "unlike a statute of limitations" (Brief for Appellant at 47 n.14), the Illinois Supreme Court's opinion strongly suggests that that is exactly what it is like. *See* 82 Ill.2d at 103-04, 411 N.E.2d at 280 (J.A. 31) (citing the *Springfield-Sangamon* case.)

This Court has recently reaffirmed that "where a state law does not impair a right or liberty protected by the Constitution, there is no occasion to depart from 'the settled mode of constitutional analysis of legislat[ion] . . . involving questions of economic and social policy.'" *City of Mobile v. Bolden,* 446 U.S. 55, 76, 100 S.Ct. 1490, 1505, (1980), citing *San Antonio Ind. School Dist. v. Rodriguez,* 411 U.S. 1, 33, 93 S.Ct. 1278, 1296 (1973). Logan's right to seek redress for alleged employment discrimination on the basis of physical handicap exists only by virtue of Illinois law. Illinois has, in its exercise of its power to shape that right, conditioned it on the convening of a timely conference by the state agency charged with administering the applicable statute. Illinois was not required to grant Logan an unconditional right to a cause of action against the Company. Logan would prefer that the FEPA had guaranteed him the right to pursue his claim even if the Commission failed to convene a timely conference. The statute did not do so, however, and for that very reason there was no deprivation of a property or liberty interest within the meaning of the Fourteenth Amendment.

II. Assuming Arguendo That Logan Was Deprived of Property, the Company Was Not Responsible for That Deprivation, and Should Not Be Forced to Sacrifice its Substantive Rights Under State Law to Redress the Commission's Negligence.

In the *Martinez* decision, this Court said that a state-created cause of action was "arguably" a species of property for the purpose of analyzing the constitutionality of a state statute that provided certain state officials with immunity from a wrongful death action. Yet the Court went on to hold that the immunity statute did not violate the Fourteenth Amendment, reasoning that "even if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Martinez v. California,* 444 U.S. 277, 282, 100 S.Ct. 553, 557 (1980). The Court reviewed the State of California's purposes for enacting the immunity statute, as set forth in the decision of the California court, and concluded:

> "Whether one agrees or disagrees with California's decision to provide absolute immunity for parole officials in a case of this kind, one cannot deny that it rationally furthers a policy that reasonable lawmakers may favor. As federal judges, we have no authority to pass judgment on the wisdom of the underlying policy determination. We therefore find no merit in the contention that the State's immunity statute is unconstitutional when applied to defeat a tort claim arising under state law."

444 U.S. at 283, 100 S.Ct. at 558.

In its decision in this case, the Illinois Supreme Court articulated the legislative policies which underlie the 120-day requirement:

> "Under section 8(b) the interests of both employee and employer can be served in that each is given an opportunity to discuss and possibly settle the dispute without formal action being taken against the employer by the Commission. Through a conference, unnecessary costs may be avoided and the Commission permitted to devote itself to other matters. Even if a settlement is not reached at this state, the proceeding can be importantly valuable to the Commission in that the conference not only places the Commission in a better posture to decide whether to dismiss the employee's charge, it also aids the Commission in setting up a procedural framework for the conciliatory process which follows. (See Ill. Rev. Stat. 1979, ch. 49, par. 858(c).) The public interest in an expenditous resolution of disputes which is made possible through section 8(b) is not less important than the financial considerations discussed in *Springfield-Sangamon*. Avoiding unnecessary expenditures of time and money by all parties serves to further the stated policy of the Act, which is not only to protect employees from unfair employment practices but also to protect 'employers, labor organizations and employment agencies from unfounded charges of discrimination.' Ill. Rev. Stat. 1979, ch. 48, par. 851."

82 Ill.2d at 105-06, 411 N.E.2d at 281. (J.A. 33).

Neither these articulated state policies nor the way that the 120-day requirement furthers these policies can reasonably be termed "wholly arbitrary or irrational." Logan's real contention is not that Section 8(b) is arbitrary or irrational; it is that the Commission's negligent failure to convene a timely conference resulted in Logan's arbitrarily and irrationally losing his right to pursue his

charge. Yet Logan has chosen not to sue the Commission or any of its employees for their negligence,[7] but instead asks "only that his cause of action be reinstated" before the Commission. Brief for Appellant at 33 n.7. Logan ignores the fact that under state law, as articulated by the Illinois Supreme Court, the Company also has rights. Nothing in the Fourteenth Amendment compels or even permits this Court to reinstate Logan's claim against the Company as a means of compensating Logan for the Commission's negligence. Rather, remedying any deprivation is a matter to be resolved between Logan and the State of Illinois.

This Court has recently held that post-deprivation remedies made available by the state can satisfy the requirements of the due process clause. In *Parratt v. Taylor,* ..... U.S. ....., 101 S.Ct. 1908 (1981), state employees in a Nebraska prison negligently misplaced mail order hobby materials belonging to Taylor, a prisoner. Taylor brought an action under 42 U.S.C. §1983 to recover the value of the lost materials, alleging that he had been deprived of property without due process of law in violation of the Fourteenth Amendment.

Although a federal cause of action was involved in *Parratt v. Taylor,* the constitutional issue in that case was identical to the issue here: whether there was a deprivation of property without due process of law. *See Parratt v. Taylor,* ..... U.S. ....., ..., 101 S.Ct. 1908, 1913 (1981).

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[7] Presumably, in an action against the Commission or its employees Logan would have to prove, as in legal malpractice cases, that he had a meritorious claim against the Company which was lost due to the negligence of the investigator.

Taylor alleged that the negligent acts of the prison employees deprived him of his hobby materials; Logan maintains that the Commission's negligence deprived him of a cause of action.

Writing for a four-member plurality, Justice Rehnquist first noted that Taylor's claim satisfied three prerequisites of a valid due process claim. The prison employees had acted under color of state law; the hobby materials fell within the definition of property[8]; and "the alleged loss, even though negligently caused, amounted to a deprivation." ..... U.S. at ....., 101 S.Ct. at 1913. The Court went on to decide, however, that no violation of the due process clause had been stated because the deprivation was not "without due process of law:"

> "Although he has been deprived of property under color of state law, the deprivation did not occur as a result of some established state procedure. Indeed, the deprivation occurred as a result of the unauthorized failure of agents of the State to follow established state procedure. There is no contention that the procedures themselves are inadequate nor is there any contention that it was practicable for the State to provide a predeprivation hearing. Moreover, the State of Nebraska has provided respondent with the means by which he can receive redress for the deprivation. The State provides a remedy to persons who believe they have suffered a tortious loss at the hands of the State . . . . The remedies provided could have fully compensated the respondent for the property loss he suffered, and we hold that they are sufficient to satisfy the requirements of due process."

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[8] There was no contention that under Nebraska law Taylor did not enjoy a property interest in the hobby materials. ..... U.S. at ....., 101 S.Ct. at 1910 n.1.

..... U.S. at ....., 101 S.Ct. at 1917. The similarities between the *Parratt v. Taylor* case and Logan's case are striking. Logan's charge was dismissed because of the unauthorized failure of the Commission to follow established state procedure which required the convening of a timely fact-finding conference. Logan does not contend that the Commission's conciliation procedures are inadequate; indeed, he seeks reinstatement of his claim so that he may enjoy "the same opportunity to present his case and have state judicial review that is afforded all other complainants whose claims were not negligently extinguished." Brief for Appellant at 33 n.7. A predeprivation hearing would have been no more practicable here than in *Parratt v. Taylor* because the negligent failure of the Commission to schedule a conference was as much a "random and unauthorized act by a state employee" (..... U.S. at ....., 101 S.Ct. at 1915) as was the loss of Taylor's hobby materials.

Finally, a remedy similar to the remedy available to Taylor under Nebraska law is available to Logan under Illinois law. The Illinois Court of Claims Act grants jurisdiction over "all claims against the State for damages in cases sounding in tort." Ill. Rev. Stat. ch. 37, §439.8(d) (1979).[9] Logan maintains that this remedy is "uncertain" but cites no authority indicating that no ac-

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[9] The 1970 Illinois Constitution abolished sovereign immunity "[e]xcept as the General Assembly may provide by law." Ill. Const. Art. 13, §4. As established by statute, Illinois's waiver of sovereign immunity is coextensive with the jurisdiction of the Illinois Court of Claims. Ill. Rev. Stat. ch. 127, §801 (1979); *Liebman v. Board of Governors*, 79 Ill. App.3d 89, 398 N.E.2d 305 (1st Dist. 1979).

tion would lie for a loss such as his.[10] If that were the case, and Illinois offered no alternative remedy,[11] then the clear import of this Court's holding in *Parratt v. Taylor* is that Logan would have a valid §1983 action against the state employees who negligently deprived him of his interest in his FEPA charge. *See* ..... U.S. at ....., 101 S.Ct. at 1912 ("Nothing in the language of §1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights"); ..... U.S. at .....,

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[10] Logan also argues that the relief available in a Court of Claims action would not compensate him as fully for alleged employment discrimination as would his potential recovery in an FEPA action. Brief for Appellant at 24 n.5. The Court in *Parratt v. Taylor* rejected a similar argument made by Taylor with respect to the Nebraska tort claims procedure. *See* ..... U.S. at ....., 101 S.Ct. at 1917. Moreover, Logan presumes that he would have prevailed in his FEPA action against the Company, a fact which remains unproven.

[11] *See* Brief for Appellant at 24-25 n.5. The Illinois Equal Opportunity for the Handicapped Act, Ill. Rev. Stat. ch. 38, §65-21 *et seq.* (1979), was repealed when the Illinois Human Rights Act went into effect on July 1, 1980. Causes of action arising under the EOHA prior to July 1, 1980, are not affected by the repeal. Ill. Rev. Stat. ch. 68, §9-102(2) (Supp. 1980).

Logan also appears to have a cause of action against the individual commission employee or employees who negligently failed to schedule the conference within the time limitation. *See Lusietto v. Kingan*, 107 Ill. App.2d 239, 243, 246 N.E.2d 24, 26-27 (3d Dist. 1969) ("The failure of a public officer to perform a public duty can constitute an individual wrong only when some person can show that in the public duty was involved also a duty to himself as an individual, and that he has suffered a special and peculiar injury by reason of its non-performance.") Public officials enjoy immunity only when they are exercising their official discretion on matters which are discretionary in nature and not ministerial. *Id.*

101 S.Ct. at 1918 (Blackmun, J., and White, J., concurring); ..... U.S. at ....., 101 S.Ct. at 1923 (Marshall, J., concurring); *but see* ..... U.S. at ....., 101 S.Ct. at 1918 (Powell, J., concurring in the result) (negligent acts by state officials do not constitute a deprivation of property within the meaning of the Fourteenth Amendment.)

CONCLUSION

For the foregoing reasons, appellee Zimmerman Brush Company requests that the judgment of the Illinois Supreme Court be affirmed, or in the alternative, that the appeal be dismissed.

Respectfully submitted,

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APPENDIX

Section 8 of the Illinois Court of Claims Act (Ill. Rev. Stat. ch. 37, §439.8 (1979)) provides in pertinent part:

> § 8. The court shall have exclusive jurisdiction to hear and determine the following matters:
>
> . . .
>
> (d) All claims against the State for damages in cases sounding in tort, if a like cause of action would lie against a private person or corporation in a civil suit, and all like claims sounding in tort against the Medical Center Commission, the Board of Trustees of the University of Illinois, the Board of Trustees of Southern Illinois University, the Board of Regents of the Regency Universities System or the Board of Governors of State Colleges and Universities; provided, that an award for damages in a case sounding in tort, other than certain cases involving the operation of a State vehicle described in this paragraph, shall not exceed the sum of $100,000 to or for the benefit of any claimant. The $100,000 limit prescribed by this Section does not apply to an award of damages in any case sounding in tort arising out of the operation by a State employee of a vehicle owned, leased or controlled by the State. The defense that the State or the Medical Center Commission or the Board of Trustees of the University of Illinois, the Board of Trustees of Southern Illinois University, the Board of Regents of the Regency Universities System or the Board of Governors of State Colleges and Universities is not liable for the negligence of its officers, agents, and employees in the course of their employment is not applicable to the hearing and determination of such claims.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

No. 80-5950

LAVERNE L. LOGAN,
Appellant,
vs.
ZIMMERMAN BRUSH COMPANY,
Appellee.

On Appeal From The Supreme Court Of Illinois

SUPPLEMENTAL BRIEF FOR APPELLEE ZIMMERMAN BRUSH COMPANY

STATUTES AND PROVISIONS INVOLVED

The following are in addition to the Constitutional and Statutory Provisions cited in the Brief for Appellant.

Article 13, Section 4 of the 1970 Illinois Constitution provides: "Except as the General Assembly may provide by law, sovereign immunity in this State is abolished."

Chapter 127, Section 801 of the Illinois Revised Statutes (1979) provides:

> "Except as provided in "AN ACT to create the Court of Claims, to prescribe its powers and duties, and to repeal an AN ACT herein named,' filed July 17, 1945, as amended, the State of Illinois shall not be made a defendant or party in any court."

The applicable section of the Illinois Court of Claims Act is set forth in the Appendix to this Brief.

STATEMENT OF THE CASE

On November 14, 1979, appellant Laverne L. Logan ("Logan") filed an employment discrimination charge with the Illinois Fair Employment Practices Commission ("Commission"). Logan charged that his employer, appellee Zimmerman Brush Company ("Company"), had discriminated against him because of his physical handicap, a short left leg. On January 30, 1980, the Company received notice from the Commission that a fact-finding conference would be held on March 18, 1980. The Company also received a questionnaire, which it was directed to answer by March 10, 1980. The Company filed its answers to the questionnaire with the Commission on March 7, 1980. In its answers, the Company stated that it had made efforts to accommodate Logan's handicap, but that he was unable to handle the physical requirements of either the job he was initially hired to do or the alternative job the Company had given him[1] and that accordingly he was terminated. (J.A. 10-11).

On March 18, 1980, the Company appeared at the fact-finding conference for the sole purpose of filing a motion to dismiss. The Company asserted that Logan was not entitled to have the Commission pursue his charge because the Commission had failed to convene a fact-finding conference within 120 days of the filing of the charge, as required by Section 8(b) of the Illinois Fair

[1] The Illinois Fair Employment Practices Act (FEPA) prohibited discrimination against "physical or mental handicap *unrelated to ability*." Ill. Rev. Stat. ch. 48, §853(a) (1979) (emphasis added) (current version at Ill. Rev. Stat. ch. 68, §1-103(I)(1) (Supp. 1980)).

Employment Practices Act ("FEPA").[2] (J.A. 14). The Commission denied the Company's motion and on March 19, 1980, notified the Company that the investigation of Logan's charge would continue. The Commission also requested interviews with certain of the Company's employees and informed the Company that failure to comply with this request could result in a finding that there was "substantial evidence" to support Logan's charge. (J.A. 16).

On March 20, 1980, the Company petitioned the Supreme Court of Illinois for a writ of prohibition. Proceedings before the Commission were stayed pending the decision on the petition. (J.A. 24-25). Prior to oral argument on the petition, on April 30, 1980, Logan filed a second charge, identical to his first, with the Commission. (J.A. 26-27). The Commission notified the Company of its intent to proceed on the second charge and the Company moved to stay proceedings on the second charge, which motion was granted. (J.A. 30).

On September 29, 1980, the Supreme Court of Illinois awarded the Company a writ of prohibition against the

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[2] The section in effect at the time provided:

> "Within 120 days of the proper filing of a charge, the Commission shall convene a fact finding conference (unless the charge has been withdrawn or dismissed) for the purpose of obtaining evidence, identifying issues in dispute, ascertaining the positions of the parties, and exploring the possibility of a negotiated settlement of the controversy. Notice of such conference shall be given to all parties at least 10 days prior thereto and a default order may be entered against any party who fails to attend such conference without good cause shown."

Ill. Rev. Stat. ch. 48, §858(b) (1979) (current version at Ill. Rev. Stat. ch. 68, §7-102(C)(3) (Supp. 1980)).

Commission. *Zimmerman Brush Company v. Illinois Fair Employment Practices Commission*, 82 Ill.2d 99, 411 N.E. 2d 277 (1980). The court construed the language of Section 8(b), directing that the Commission convene a fact-finding conference within 120 days of the filing of a charge, as mandatory, and held that the Commission's failure to convene a timely conference in Logan's case required the automatic dismissal of his charge. The court rejected the Commission's contention that the 120-day requirement should be viewed as discretionary.

Prior to the Illinois Supreme Court's decision, the Illinois legislature repealed the FEPA and reenacted it, as amended, as part of the Illinois Human Rights Act.[3] In the Illinois Supreme Court, Logan argued that his second charge should be governed by the amended Act, which he contended made fact-finding conferences discretionary.[4] The court did not rule on this contention but refused to apply the new Act retroactively to Logan's second charge.

The court also rejected Logan's argument that Section 8(b) as construed violated his Fourteenth Amendment due process and equal protection rights, holding that:

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[3] Illinois Human Rights Act, P.A. 81-1216, 1979 Ill. Legis. Serv. 3380 (West) (effective July 1, 1980) (codified at Ill. Rev. Stat. ch. 68, §§1-101 *et seq.* (Supp. 1980)).

[4] Section 7-102(C)(3) of the Illinois Human Rights Act provides:

> "Upon reasonable notice to the complainant and the respondent, the Department may conduct a fact-finding conference. The fact-finding conference shall be held within 120 days of the date on which a charge has been filed unless waived by the parties in writing 10 days before the 120 day period has expired."

Ill. Rev. Stat. ch. 68, §7-102(C)(3) (Supp. 1980).

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No. 80-5950

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Supreme Court of the United States

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LAVERNE L. LOGAN,

Appellant,

v.

ZIMMERMAN BRUSH COMPANY,

Appellee.

On Appeal From The Illinois Supreme Court

REPLY BRIEF FOR APPELLANT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-5950

LAVERNE L. LOGAN,

Appellant,

v.

ZIMMERMAN BRUSH COMPANY,

Appellee.

On Appeal From The Illinois Supreme Court

REPLY BRIEF FOR APPELLANT

I. The Procedures Of The Fair Employment Practices Act Deny Mr. Logan The Due Process Guaranteed By The Fourteenth Amendment.

The State of Illinois created, through the Fair Employment Practices Act (the "FEPA"), a set of procedures whereby an individual can seek redress for employment discrimination. According to the provisions of the FEPA, Mr. Logan had every reason to expect that the Fair Employment Practices Commission (the "Commission") would determine whether his claim was meritorious and whether he should be awarded reinstatement, back pay and other relief. Instead, Mr. Logan's action was automatically dismissed due to the failure of the Commission's Investigator to schedule a fact finding conference within 120 days of the filing of the charge. To automatically dismiss Mr. Logan's claim — with no consideration of its merits — is to deny him the due process guaranteed him by the Fourteenth Amendment.

In this case, due process requires that a conscious and intentional decision be made based on the merits of Mr. Lo-

gan's claim or the conduct of the parties. The Company in its Supplemental Brief does not contest that Mr. Logan complied with all his statutory obligations. Supplemental Brief for Appellee at 2. Moreover, the Company has never asserted that the termination of Mr. Logan's claim was the result of a decision by the Commission on the merits of his claim. Even the Attorney General of Illinois writing on behalf of the Human Rights Commission (successor to the Fair Employment Practices Commission) states that Mr. Logan's claim was terminated "through no fault of his own and without any consideration of the merits." Brief of Illinois Human Rights Commission at 2.

At a minimum, due process requires that Mr. Logan should have received prior notice. Proper notice could have informed him that his claim was in jeopardy of automatic termination if the Commission failed to schedule a fact finding conference within 120 days. It should also have apprised him of procedures which he could take to avoid this loss. Brief for Appellant at 16.

The Company's response to these contentions in its Supplemental Brief centers on *Parratt* v. *Taylor,* 101 S.Ct. 1908 (1981). In *Parratt,* this Court decided that a prison inmate who lost his hobby kit as a result of the negligence of a prison employee was not denied due process since he had an adequate state remedy. The Court, however, was careful to set out the circumstances which must exist before any analysis is made of the adequacy of alternative state remedies.

First, the Court found that "the loss is not the result of some established state procedure." *Id.* at 1915-1916. In *Parratt,* the hobby kit was lost because the prison employee did not follow the proper procedures for handling prisoners' property. Here, at first blush, the same thing appears to have happened. The investigator misread her calendar and scheduled the fact finding conference five days later than the state procedure provided.

But the loss here did not actually occur until the Illinois Supreme Court decided that the consequence would be that Mr. Logan would lose his case. The proper comparison to *Parratt* is that here the negligence caused only the loss of a timely fact finding conference. But Mr. Logan does not assert that he was denied due process by not having a timely fact finding conference. The due process violation is that he has lost his case because of the negligent failure to hold the fact finding conference on time, not because of a decision on the merits after notice and an opportunity to be heard. It was an established state procedure as decided by the Illinois Supreme Court which determined the consequence for the negligent conduct by the state investigator. And it is this procedure, the "automatic" termination, Supplemental Brief for Appellee at 15, which violates due process. In fact, Mr. Logan challenges the FEPA specifically because it makes negligent conduct by state employees a state procedure for disposing of employment discrimination charges.[1]

Second, the Court found that "it is not only impractical but impossible to provide a meaningful hearing before deprivation." 101 S.Ct. at 1916. In *Parratt*, there was no way to provide due process before the final loss of the hobby kit occurred. Once the kit was lost, all that could be provided was com-

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[1] In *Parratt*, the Court quoted the panel opinion in *Bonner* v. *Coughlin*, 517 F.2d 1311 (7th Cir. 1975) (Stevens, J.), *modified en banc*, 545 F.2d 565 (1976), *cert. denied*, 435 U.S. 932 (1978) and adopted its distinction between cases that concern the adequacy of established state procedures and those that concern property damage due to official misconduct:

> It seems to us that there is an important difference between a challenge to an established state procedure as lacking in due process and a property damage claim arising out of the misconduct of state officers. In the former situation the facts satisfy the most literal reading of the Fourteenth Amendment's prohibition against "State" deprivations of property. 517 F.2d at 1319, 101 S.Ct. at 1916. Because *Bonner* was an isolated act of negligence by a state employee, the court then inquired about the existence of adequate state remedies. *See Kimbrough* v. *O'Neil*, 523 F.2d 1057, 1066 (7th Cir. 1975) (Stevens, J., concurring) *aff'd en banc*, 545 F.2d 1059 (1976).

pensation. Here, however, the deprivation is the loss of Mr. Logan's employment discrimination action due to the Illinois Supreme Court's construction of a statutory deadline. To be sure, no fact finding conference can ever again be scheduled within 120 days from the time Mr. Logan filed his charge. But the consequence of the negligent failure to convene the fact finding conference can still be examined and reversed. Mr. Logan can still be given a hearing and a decision on his employment discrimination charge. The deprivation will never finally occur if this Court reverses the Illinois Supreme Court and permits Mr. Logan's charge to be decided.

Unlike *Parratt* and the cases on which it relied, here there is no "impracticality of providing any meaningful predeprivation process" which leads the court to inquire as to "the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking." *Id.* at 1915. The instant case is similar to *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950), where this Court was asked not to compensate a due process deprivation, but rather to reverse a state supreme court's decision that would otherwise have cut off the rights of persons with legal claims without affording them notice and other due process protections. In *Mullane*, this Court reversed the New York Court of Appeals and imposed proper safeguards for the adjudication of the potential claims against the common trust. *See Armstrong* v. *Manzo*, 380 U.S. 545 (1965) (where the Court reversed the Texas Supreme Court's affirmance of an adoption decree, because the divorced father was not afforded sufficient notice and opportunity to appear).

In cases like *Mullane*, *Armstrong*, and this one, a reviewing court need not search for alternative remedies, as this Court had to do in *Parratt*. Instead, all that must be examined is the adequacy of the established state procedure in light of due process requirements. If the procedures are inadequate, this Court should reverse and remand for a new adjudication with adequate procedures. To say that reversal in this case is the exercise of "supervisory jurisdiction over state courts," Sup-

plementary Brief for Appellee at 7, is to ignore the duty of this Court to pass on the constitutionality of state procedures in the very case in which the procedures were applied, as this Court ordinarily does in the exercise of its jurisdiction pursuant to 28 U.S.C. § 1257(2).

Parratt is distinguishable on other grounds as well. *Parratt* involved a loss that might easily be characterized as *De minimis;* at stake in this case is two years of back pay which may be as high as $15,000 at this time, restoration of employment with the Company, and other relief provided by the FEPA. Brief for Appellant at 39-40.

Parratt was brought under 42 U.S.C. § 1983, and the Court was concerned about extending a federal remedy to "every alleged injury which may have been inflicted by a state official acting under 'color of law'. . . ." *Id.* at 1917. Here Mr. Logan chose to bring his charge in a state administrative tribunal; he asserts no claim under 42 U.S.C. § 1983. The state tribunal, represented by the Attorney General of Illinois, supports Mr. Logan's position. The Company castigates Mr. Logan for "choosing" this forum. Supplemental Brief for Appellee at 6. In fact, it is the Company that chose the judicial forum, by beginning an original action in the Illinois Supreme Court asking for a writ of prohibition. Curiously, in its anxiety to avoid defending in the state tribunal, the Company argues that Mr. Logan may have a remedy under § 1983 for deprivation of his charge without due process if this Court rejects his appeal and no alternative state remedy exists. Thus, the Company's argument would expand § 1983 liability.

Finally, unlike *Parratt,* this case involves an adjudication, not random or accidental damage to property. In the context of a criminal case, this Court overturned a court rule which barred an untimely appeal filed by the defendant himself because his retained counsel had not filed a timely appeal. *Rodriquez* v. *United States,* 395 U.S. 327 (1969). Similarly, in *Macon* v. *Lash,* 458 F.2d 942 (7th Cir. 1972) (Stevens, J.), the statutory right to a criminal appeal was foreclosed because a court-appointed attorney, through inexperience, failed to per-

fect the appeal correctly. The court held that such a result violated the Fourteenth Amendment and ordered that the petitioner be permitted to prosecute his appeal. The court in *Macon* relied on *Lane* v. *Brown*, 372 U.S. 477 (1963), where the petitioner's appeal rights had been by the decision of the state public defender not to take an appeal. The *Lane* Court ruled that the petitioner should be provided a new appeal to the state supreme court. In these cases, the courts found that the right to pursue an appeal (a right that was merely statutory, not constitutional) could not be cut off under state procedures that enabled persons other than the petitioner to cause the cut-off, either by negligence or conscious decision. In certain respects, the instant case presents a more obvious deprivation of due process than these cases. Here, the person whose conduct first led to the cutting off of Mr. Logan's right to pursue his case is in no sense his agent. Moreover, in the instant case the procedure is being attacked within the adjudication itself, not in a collateral proceeding. *Rodriguez*, *Macon* and *Lane* were all habeas corpus proceedings. *See Lane*, 372 U.S. at 484.

II. Mr. Logan's Action Under The FEPA Is A Property Interest Which Must Be Protected By Procedures Complying With Due Process Requirements.

The FEPA creates an interest protected by due process. This interest arises under the FEPA because victims of employment discrimination are entitled to relief when they can show that they have been discriminated against by their employers. *See infra;* Brief for Appellant at 28-30; Brief of Illinois Human Rights Commission at 3-6. Mr. Logan's action qualifies as property because of his objective expectation firmly fixed in state law (the FEPA) that he will be granted relief upon a showing that his employer discriminated against him. Moreover, state law provides expressly for judicial review of the Commission's decision. Having created this protected interest, the state cannot terminate a charge without using procedures that satisfy due process. The Company mischaracterizes the opinions of this Court when it argues that Mr. Lo-

gan's employment discrimination action is conditioned on the procedures set forth in the FEPA as they have been interpreted by the Illinois Supreme Court. Supplemental Brief for Appellee at 16-17. The Company's argument has been expressly rejected by this Court in *Arnett* v. *Kennedy*, 416 U.S. 134 (1974) and *Vitek* v. *Jones*, 445 U.S. 480 (1980). A state created entitlement cannot constitutionally be limited by procedures that violate due process.

The Company relies on *Martinez* v. *California* to support its position. 444 U.S. 277 (1980). *Martinez*, however, is irrelevant to this issue. There the Court held that a state statute which provides a defense of absolute immunity for parole officers from a wrongful death action did not violate substantive due process. Absolute immunity was found not to be wholly arbitrary and irrational. In the process of deciding the case, this Court first assumed that there was a state created property interest and then indicated that the property interest in a cause of action is defined not only by the elements of the action but also by the defenses provided at state law. The Company implies that footnote 5 in *Martinez*, *id.* at 282, undercuts *Arnett* v. *Kennedy* and establishes that state entitlements are subject to whatever procedures the state provides, even if those procedures do not meet the procedural requirements of due process. The Company applies its argument to Mr. Logan's case and concludes that the procedure provided by the state here, the termination of Mr. Logan's action because of the negligence of the investigator, is all that due process requires. But the Company is wrong in its analysis.

First *Arnett* is still good law as was shown by *Vitek* v. *Jones*, decided two months after *Martinez*. In *Vitek*, a Nebraska statute permitted prison officials to transfer prisoners to mental hospitals. The only statutory requirement for a transfer was the determination by a physician or psychologist that the inmate was suffering from a mental disease or defect which could not be properly treated in the prison. 445 U.S. at 483. The Court held that because the statutory arrangement did not provide for transfers at will but only when prisoners

met the statutory tests, an entitlement was created which was protected by due process.

> "[T]he minimum requirements of procedural process appropriate for the circumstances must be observed." *Wolff* v. *McDonnell*, [418 U.S. 539 (1974)] at 558. These minimum requirements being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.

Id. at 491. In reaching this position the Court relied on *Arnett* and quoted the following language from Justice Powell's opinion.

> The plurality opinion evidently reasons that the nature of appellee's interest in continued federal employment is necessarily defined and limited by the statutory procedures for discharge and that the constitutional guarantee of procedural due process accords to appellee no procedural protections against arbitrary or erroneous discharge other than those expressly provided in the statute. The plurality would thus conclude that the statute governing federal employment determines not only the nature of appellee's property interest, but also the extent of the procedural protections to which he may lay claim. It seems to me that this approach is incompatible with the principles laid down in *Roth* and *Sindermann*. Indeed, it would lead directly to the conclusion that whatever the nature of an individual's statutorily created property interest, deprivation of that interest could be accomplished without notice or a hearing at any time. This view misconceives the origin of the right to procedural due process. That right is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. As our cases have consistently recognized, the adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Bell* v. *Burson*, 402 U.S. 535 (1971); *Board of Regents* v. *Roth*, [408 U.S. 564 (1972)]; *Perry* v. *Sindermann*, [408 U.S. 593 (1972)].

Arnett v. *Kennedy*, 416 U.S. at 166-167, quoted at 445 U.S. at 490, n.6. The importance of this Court's rulings in *Arnett* and *Vitek* cannot be given enough emphasis. To approve the Company's view would effectively destroy the Fourteenth Amendment's due process clause. The due process clause would become a mere shell, protecting individuals from deprivations of state created entitlements only when the state itself adopts the procedures required by the due process clause. While the state may choose not to confer a property interest "it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." *Id.*

The FEPA provides that "equal employment opportunity . . . without discrimination because of . . . physical or mental handicap unrelated to ability . . . shall be protected by State law." § 851 (J.A. 37). It provides that it is an "unfair employment practice: (a) For any employer, because of . . . physical or mental handicap unrelated to ability of an individual, . . . to discriminate against such individual with respect to hire, . . . tenure, terms or conditions of employment . . ." § 853 (J.A. 39). And it provides that, "When all the testimony has been taken, the Commissioner or Adjudicator shall determine whether the respondent has engaged in or is engaging in the unfair employment practice with respect to the person aggrieved as charged in the complaint," and award an order to cease the discrimination, back pay and other relief. § 858.01(c) (J.A. 48).

Like the statute at issue in *Vitek*, the statute here establishes a standard for governmental action, one that creates an "objective expectation, firmly fixed in state law," 445 U.S. at 489, that discrimination is outlawed and that a victim of discrimination can obtain justice from the Commission in the form of injunctive relief and back pay. Having created this expectation, the state cannot destroy it by terminating charges on the basis of an investigator's scheduling error. Rather, charges can only be terminated upon notice and a decision on the case.

Secondly, footnote 5 of *Martinez*, when properly read, does not permit the state to establish whatever procedures it wants. The language of the footnote shows that the state can define the elements of a cause of action and the defenses.

> 5. It is arguable, however, that the immunity defense, like an element of the tort claim itself, is merely one aspect of the State's definition of that property interest. Recently, in considering a lawyer's claim of immunity in a state malpractice action, we noted that "when state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law." *Ferri* v. *Ackerman*, [444 U.S. 193] at 198 [(1979)].

444 U.S. at 282. The Court does not suggest that having defined the property interest the state can then provide procedures which do not meet the procedural requirements for due process. In Mr. Logan's case the State of Illinois has set forth the elements of a cause of action for employment discrimination and has given the employer certain defenses as well. In this appeal, Mr. Logan does not contest the substantive law of employment discrimination in Illinois. Rather it is the procedures which he argues fall short of due process requirements, that is, the termination of his claim by reason of the failure to convene a timely fact finding conference and not by a decision based on the merits of his case. Footnote 5 in *Martinez* simply does not address the question of whether the state can provide whatever procedures it wants.

III. Dismissal Of Mr. Logan's Charge Because Of The Failure Of The Commission's Investigator To Convene A Timely Fact Finding Conference Is Wholly Arbitrary And Irrational, And Therefore Violates Due Process.

The Company in its Supplemental Brief, does not dispute Mr. Logan's reading of *Martinez* v. *California* that, assuming there is a property interest in a cause of action, the state procedure and defenses to the cause of action must not be "wholly arbitrary and irrational." *Martinez* at 282. In his initial brief,

Mr. Logan established that the termination of his rights meets this standard and therefore his due process rights were violated. Brief for Appellant at 26.

The irrationality of terminating Mr. Logan's action as the Illinois Supreme Court did, is that he lost without any consideration of whether he should have lost. Although it was the Commission's investigator who failed to convene the conference on time, Mr. Logan was arbitrarily chosen as the one who bears the full brunt of her negligent violation of the statutory requirements. The remedy employed here is a wholly arbitrary and irrational way to compel the Commission's investigator to hold a fact finding conference on time. There is no incentive for the investigator to alter her behavior or for the Commission to monitor its employees to assure compliance with statutory deadlines.

While the Illinois authorities rather than this Court are responsible for finding a non-arbitrary way to have fact finding conferences convened on time, one rational solution would be to fine or discipline this investigator and others who fail to meet their statutory obligations. The burden would then be placed on the investigator, where it belongs, rather than on an innocent private party.

The Company fundamentally mischaracterizes the nature of the relationship between the charging party and the Commission in an employment discrimination proceeding brought under the FEPA. The Company incorrectly describes the Commission as acting as an agent for the complaining party, or, alternatively, as a prosecutor protecting the interests of the State of Illinois. The Company uses this mischaracterization to argue that it is reasonable to make the complainant suffer the consequences of the Investigator's statutory violation. Supplemental Brief for Appellee at 14-15. In truth, the Commission's role is like a trier of fact. At each stage of the process of adjudicating charges of employment discrimination, the Commission makes determinations on the merits of the case. *See* Brief for Appellant at 28-29.

IV. Termination Of Mr. Logan's Employment Discrimination Claim Violates Equal Protection.

Termination of Mr. Logan's employment discrimination charge because the investigator convened the fact finding conference late also violates equal protection, because it is the application of an irrational governmental classification. In the Brief for Appellant, Mr. Logan demonstrated that blanket dismissal of all such charges does not rationally serve any governmental purpose. In its Supplemental Brief, the Company concedes that the dismissal does not serve to eliminate unfounded charges, Supplemental Brief for Appellee at 18, and fails to identify any purpose the dismissal does serve.

The Company advances just two arguments. First, it contends that the statute at issue does not "create a class of claimants whose conferences are not timely convened, because its express mandate is that such conferences be convened." Supplemental Brief for Appellee at 18. Mr. Logan's quarrel, of course, is with the Statute as interpreted by the Illinois Supreme Court. This interpretation, as the Company forthrightly concedes, "not only allows but *requires* 'automatic dismissal' of FEPA charges. . . ." Supplemental Brief for Appellee at 15 (emphasis in original). Second, the Company says that the 120 day requirement is like a statute of limitations, but ignores the critical distinctions that Mr. Logan has already pointed out. Brief for Appellant at 26, 47.

Like the double-bond requirement in *Lindsey* v. *Normet,* 405 U.S. 56 (1972), the statute here has the effect of dividing persons with equivalent legal claims into two categories. In *Lindsey,* those in the disfavored category, forcible entry and detainer appellants, were subject to a special burden for no good reason. In the instant case, persons in the disfavored category suffer complete loss of their claims for no reason at all. An irrational harm is visited on one category of legal claimants.

A charging party, just like an employer, has an interest in the speedy adjudication of an employment discrimination

charge If the Illinois statute had been interpreted by the Illinois Supreme Court to require that whenever a fact finding conference was not held in 120 days, the charging party would take judgment by default, the employer would certainly contend that its Fourteenth Amendment rights were violated. Nevertheless, to the extent that the rule that now exists serves any purpose, the proposed rule would serve just as well. And to the extent that one party should be penalized for delay that neither caused, it may as well be the employer as the charging party. Irrational dismissal of a legal claim without notice and decision is just as offensive as irrational imposition of liability without such safeguards. Both offend "raw justice," Supplemental Brief for Appellee at 13, and both offend the Fourteenth Amendment.

V. Conclusion

For the foregoing reasons, the judgment of the Illinois Supreme Court should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LAVERNE L. LOGAN,

Appellant,

VS.

ZIMMERMAN BRUSH COMPANY,

Appellee.

On Appeal From The
Supreme Court Of Illinois

BRIEF FOR CONGRESS OF ORGANIZATIONS OF THE PHYSICALLY HANDICAPPED AND CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, INC. AS AMICUS CURIAE

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STATEMENT OF INTEREST

The Illinois Congress of Organizations of the Physically Handicapped ("COPH") is comprised of 32 organizations and approximately 4,000 individual members. COPH seeks to promote the civil rights of all physically handicapped individuals. COPH provides counseling and referral to handicapped individuals, many of whom are unemployed or under-employed as a result of unlawful discrimination. COPH seeks to file this brief amicus curiae in order to assert the significant interest of the handicapped in preventing the arbitrary dismissal of charges of employment discrimination.

Chicago Lawyers' Committee for Civil Rights Under Law, Inc. ("Lawyers' Committee") is comprised of approximately 50 Chicago law firms. In recent years, the Chicago Lawyers' Committee has devoted substantial attention to the area of employment discrimination.

For instance, the Lawyers' Committee has been involved in class action litigation concerning the hiring and promotion of minorites by the Chicago Police and Fire Departments and concerning Equal Pay Act and Title VII discrimination practiced against women employees of the City of Chicago.

While the Lawyers' Committee represents poor, minority and handicapped persons in class action litigation, it also recognizes that it is impossible for such persons to find counsel on every occasion when vindication of their rights is necessary. The Lawyers' Committee therefore urges reversal of the decision below which creates insuperable barriers to the ability of Illinois residents to pursue without counsel state law remedies for discrimination.

No. 80-5950

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

LAVERNE L. LOGAN,

Appellant,

vs.

ZIMMERMAN BRUSH COMPANY,

Appellee.

On Appeal From The
Supreme Court of Illinois

BRIEF FOR CONGRESS OF ORGANIZATIONS OF THE PHYSICALLY HANDICAPPED AND CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, INC. AS AMICI CURIAE

SUMMARY OF THE ARGUMENT

On September 29, 1980, the Illinois Supreme Court issued a writ of prohibition barring the Illinois Fair Employment Practices Commission ("FEPC") from ever reaching a decision on the merits of appellant Laverne Logan's charge of handicap discrimination under the Illinois Fair Employment Practices Act , Ill. Rev. Stat. ch. 48, §§ 851-867 (1979)) (repealed by and re-enacted as the Illinois Human Rights Act, Ill. Rev. Stat. ch. 68, § 1-101 to § 9-102, (effective July 1, 1980)("the FEPA"). Although Mr. Logan had complied with all procedural requirements in a timely fashion, he was unable to obtain any decision on the merits of his claim because the FEPC had failed to perform its statutory duty of convening a fact finding conference within 120 days of the filing of the charge of discrimination.

The Illinois Supreme Court decision thus deprives parties charging discrimination of rights accorded them by Illinois law: the right to employment opportunity free from discrimination based upon handicap and the right to a cause of action to secure such opportunity. The dismissal of Mr. Logan's discrimination charge without any adjudication on its merits denies him due process of law under the tests articulated by this Court.

Under the standard outlined in Mathews v. Eldridge, 424 U.S. 319 (1976), such a dismissal violates due process because it deprives an individual of substantial rights, without any procedural safeguards and with negligible gains in administrative efficiency. The decision of the Illinois Supreme Court also must fall under the due process test suggested by this Court in Martinez v. California, 444 U.S. 277 (1980): the State cannot de-

prive an individual of property or liberty interests for reasons which are irrational or arbitrary.

The termination of a charging party's rights under the FEPA because the FEPC has not met its own time limits does not further the goal of just resolution of employment disputes; such terminations have nothing whatsoever to do with the merits of the charge. Neither does such a dismissal promote the efficiency of the FEPC except in the sense that a total bar to the filing of charges or the random dismissal of such charges could be said to promote administrative efficiency.

Dismissal on this basis deprives a charging party of any right under the FEPA to pursue his discrimination charge against his former employer. This deprivation is particularly serious in the case of individuals alleging discrimination on the basis of physical handicap because

such persons are barred from any remedy under federal law. The reversal of the opinion below thus is essential to the vindication of the rights of many Illinois residents, and particularly of those who are unemployed or under-employed as a result of discrimination based upon their physical handicap.

I. THE ILLINOIS SUPREME COURT'S DECISION DENIES THE RIGHT OF ILLINOIS HANDICAPPED PERSONS TO BE FREE FROM DISCRIMINATION IN EMPLOYMENT.

Appellant Laverne Logan's status as a handicapped person seeking redress from employment discrimination is central to the due process and equal protection issues raised in this appeal. Handicapped residents of the State of Illinois, under current state and federal law, have only one legal remedy for employment discrimination in cases such as this one, that is, cases which involve private employers

with no federal contracts or federal financial assistance. That remedy is the Illinois Human Rights Act, Ill. Rev. Stat. ch. 68, §1-101 to §9-102 (effective July 1, 1980), ("Human Rights Act"). The predecessor of this act in effect at the time of Mr. Logan's charge was the Illinois Fair Employment Practices Act, which provided equivalent protection against employment discrimination based on handicap.

While other protected groups, such as blacks, Hispanics, and women, have legal remedies other than those provided in the FEPA/Human Rights Act, Mr. Logan and other handicapped persons do not. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e to 2000e-17 (1976), does not prohibit discrimination in employment based on handicap. The Rehabilitation Act of 1973, 29 U.S.C. § 701 (1976) does prohibit handi-

cap discrimination in employment but only with regard to companies or entities which have federal contracts or which receive federal financial assistance. The Illinois Supreme Court has placed in jeopardy the only protection from employment discrimination of handicapped persons in Illinois by deciding that negligence by the Illinois Fair Employment Practices Commission can extinguish that protection.

Discrimination against the handicapped in employment is pervasive and thoroughly entrenched in our society.[1/] More than twenty million Americans are physically or mentally handicapped.[2/] Despite the large number of handicapped persons in society, their employment

1/ Gittler, Fair Employment and the Handicapped: A Legal Perspective, 27 DePaul L. Rev. 953, 954 (1978) [hereinafter cited as "Fair Employment"].

2/ Note, Protecting the Handicapped from Employment

(Footnote continued on next page)

rate is extremely low. Conservative estimates place at 7.2 million the number of handicapped persons able to work, yet only 800,000, or one in nine, are actually employed.[3/] Employer fears and stereotyping of handicapped persons have been long recognized as impediments to the ability of the handicapped to obtain employment.[4/]

(Footnote 2 continued from previous page)

Discrimination in Private Sector Employment: A Critical Analysis of Section 503 of the Rehabilitation Act of 1973, 54 Tul. L. Rev. 717, 717 n.1 (1980) [hereinafter cited as "Protecting the Handicapped"]; United States Office of Personnel Management, Handbook of Selective Placement of Persons with Physical and Mental Handicap in Federal Employment 1 (1979).

3/ Protecting the Handicapped, supra, note 2 at 717 n.1; S. Rep. No. 2197, 93d Cong. 2d Sess. 34 (1974) reprinted in [1974] U.S. Code Cong. & Ad. News 6373, 6408.

4/ Nagi, McBroom & Collette, Work Employment and the Disabled, 31 Am. J. Econ. & Soc. 21, 27 (1972); Olshansky, Grob & Malamud, Employers' Attitudes and Practices in the Hiring of Ex-Mental Patients, 42 Mental Hygiene 391, 394-95 (1958); Richard, Triandis & Patterson, Indices of Employer Prejudice Toward Disabled Applicants, 45 J. Applied Psych. 52 (1953).

As noted by one commentator,

> An employer's refusal to hire or promote a handicapped person is premised on a variety of factors including fears of increased costs, safety and stereotyping assumptions which frequently underestimate the capabilities of a handicapped person. 5/

The Illinois Supreme Court by its decision has impaired seriously the ability of handicapped persons to overcome such unfounded assumptions since it leaves the rights of the handicapped at the mercy of bureaucratic indifference.

The Illinois Supreme Court's decision in this case is premised upon its opinions in Springfield-Sangamon County Regional Plan Commission v. Fair Employment Practices Commission, 71 Ill. 2d 61, 373 N.E. 2d 1307 (1978), and Board of Governors v. Illinois Fair Employment Practices Commission, 78 Ill. 2d 143, 399 N.E. 2d 590 (1979), which held that a party's charge of discrimination

5/ Fair Employment, supra, note 1 at 968 n.1.

must be dismissed when the FEPC does not issue a complaint within 180 days of the filing of the discrimination charge.[6/] The court in Springfield-Sangamon interpreted the 180 day limit on the issuance of a complaint finding substantial evidence of discrimination as a statute of limitations which serves to divest the FEPC of jurisdiction. Although Mr. Logan's case does not concern the 180 day limit on the issuance of the complaint but rather the 120 day limitation on the FEPC's conducting a fact-finding hearing, the Illinois Supreme Court applied the Springfield-Sangamon principle in interpreting the 120 day time limit. It is this principle, that inaction by the FEPC can extinguish the rights of a charging party who has complied with all the re-

6/ The Human Rights Act has extended the time for issuance of a complaint from 180 days to 300 days of the filing of an initial charge. Ill. Rev. Stat. ch. 68, §7-102(G) (effective July 1, 1980).

quirements of the FEPA/Human Rights Act, which is at issue in this preceeding.[7/]

Thus due solely to the negligence of the Illinois Fair Employment Practices Commission, Mr. Logan and untold numbers of other handicapped persons in Illinois[8/],

7/ The Illinois Supreme Court has left open the question whether the 120 day limit on convening a fact-finding conference remains mandatory in light of the amendment to §7-102(c)(3) of the Human Rights Act which became effective July 1, 1980. (Appendix to Jurisdictional Statement at 6a) Regardless of how the 120 day limitation is interpreted, the Springfield-Sangamon decision still will operate to deny handicapped persons any cause of action for discrimination should the FEPC fail to issue a complaint within 300 days of the filing of a charge.

8/ The statistics for charges filed indicate the significance of the FEPA remedy to handicapped Illinois residents. In state fiscal year 1977 (July 1, 1976- June 30, 1977), 211 individuals filed charges alleging handicap discrimination; this number represented 10% of all charges filed with the FEPC. In fiscal year 1978, 348 handicap charges, representing 20% of all charges, were filed, and in fiscal year 1979, 349 handicap charges, representing 15% of all charges, were filed. These statistics do not include charges of handicap discrimination filed in conjunction with charges of race or sex discrimination. Illinois Fair Employment Practices Commission, Seventeenth Annual Report 14; Illinois Fair Employment Practices Commission, Eighteenth Annual Report 14.

have been or will be stripped of their only protection against discrimination. Such a result is grossly unfair, particularly in light of the fact that large numbers of these persons, like Mr. Logan, will not have the assistance of a lawyer in the FEPC proceedings. To expect such individuals to know the procedural requirements the FEPC must meet, in addition to those which must be followed by a charging party, is unrealistic and unfair. This Court recently stated in Hughes v. Rowe, __U.S.__, 66 L.Ed. 2d 163, 173 (1980), "An unrepresented litigant should not be punished for his failure to recognize subtle factual or legal deficiences in his claims." Certainly, a pro se party to an administrative proceeding is no more worthy of punishment when the error is not of his own making or even within his power to correct.

The Illinois Supreme Court's decision subverts the pro se nature of the administrative procedure established by the FEPA. In a real

sense, the decision rewards the FEPC for inefficiency since the FEPC can dispose quickly of excess cases simply by doing nothing. The FEPC has no accountability to charging parties; it does not represent them. Rather, it acts as a neutral third party which investigates the charges and determines whether a complaint is warranted. Handicapped persons cannot in fairness have their rights made contingent on the FEPC's taking action within 120 days.

II. THE DECISION OF THE ILLINOIS SUPREME COURT, TERMINATING CHARGES OF EMPLOYMENT DISCRIMINATION AS A RESULT OF THE INVESTIGATING STATE AGENCY'S FAILURE TO MEET STATUTORY TIME LIMITS, DEPRIVES PARTIES ALLEGING DISCRIMINATION OF THEIR RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Mr. Logan, as a result of the action of the Illinois Fair Employment Practices Commission, lost his right to an adjudication of his charge of employment discrimination under the FEPA. The FEPC failed to convene a fact-finding conference within 120 days of Mr. Logan's filing of his charge, and the

Illinois Supreme Court ruled that, as a consequence, the FEPC must terminate processing of Mr. Logan's charge without any ruling on its merits. If the Illinois Supreme Court's decision is not reversed, large numbers of individuals will be barred, through no fault of their own, from ever asserting their right under the Illinois FEPA to be free from employment discrimination. See Section I, supra at 9-10. In fact, those Illinois residents who, like Mr. Logan, claim discrimination based upon physical handicap, will lose their right to proceed in any forum to assert their legal claim. See Section I, supra at 5-6. The state thus has deprived such individuals of significant rights without due process in violation of the Fourteenth Amendment.

This Court has used a two part analysis in determining whether governmental action violates the Due Process Clause. First, the court must find that a protected

property or liberty interest has been injured and, second, the court must determine whether or not adequate protections have accompanied the deprivation effected by the state. Ingraham v. Wright, 430 U.S. 651, 672 (1977).

Mr. Logan's right to proceed to an adjudication of his discrimination claim is a property right which the Illinois General Assembly has afforded him. As this Court stated in Board of Regents v. Roth, 408 U.S. 564, 571-72 (1972):

> The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.

FEPA accorded Mr. Logan the property rights of employment conditions free from discrimination on the basis of handicap and a cause of action to secure such conditions. Such rights have the attributes of property interests in employ-

ment or government benefits which this Court has described as protected by the Due Process Clause:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.9/

Board of Regents v. Roth, 408 U.S. at 577.

Mr. Logan's expectation that Illinois law would protect him from discrimination based upon his handicap was not mere wishful thinking on his part. Ill. Rev. Stat. ch. 48, §853 (1979) provides:

9/ The line between property interests and liberty interests protected by the Due Process Clause may be difficult to discern, Paul v. Davis, 424 U.S. 693, §710 (1976). Appellant has shown in his brief that he has been deprived of an interest in liberty as well as an interest in property. Regardless of how the interest in the discrimination claim is characterized, however, it is one which is protected by the Fourteenth Amendment.

> It is an unfair employment practice: (a) For any employer, because of the race, color, religion, sex, national orgin, ancestry or physical or mental handicap unrelated to ability of an individual, or an unfavorable discharge from military service to refuse to hire, to segregate, or otherwise to discriminate against such individual with respect to hire selection and training for apprenticeship in any trade or craft, tenure, terms or conditions of employment.

In addition, Ill. Rev. Stat. ch. 48, §856.07 (1979) lists among the powers and the duties of the FEPC, "To issue, receive, investigate and determine charges [of unlawful discrimination] filed with it in conformity with this Act." Finally, Art. 1,§12 of the Illinois Constitution guarantees:

> Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely and promptly.

In fact, the General Assembly created the right to be free from employment discrimination long before it imposed the 120 day

time limit governing when fact-finding[10/] conferences must be held, a limit which it modified substantially only two years later. See Section I, supra at 10 n.7.

This Court has recognized that such state-created causes of action may constitute property within the meaning of the Fourteenth Amendment. In Martinez v. California, 444 U.S. 277, 281-82 (1980), the Court stated in dicta: "Arguably the cause of action for wrongful death that the state has created is a species of 'property' protected by the Due Process Clause." The Court said that the state's ability to deprive an individual of property is subject to

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10/ The FEPA originally was enacted in 1961. 1961 Ill. Laws 1845. In 1975, the General Assembly amended the law to prohibit discrimination on the basis of handicap unrelated to ability. P.A. 79-186, §1. In 1978, the Act was further amended to require the FEPC to convene a fact-finding conference within 120 days of the filing of a discrimination charge. P.A. 80-1452, §1.

the "federal [constitutional] interest... in protecting the individual citizen from state action that is wholly arbitrary or irrational." Martinez v. California, 444 U.S. at 287.

The Court went on to hold that if a wrongful death action did constitute property, a state could erect barriers to such an action consistent with the requirements of Due Process only if the barriers furthered another rational and legitimate state policy. In that case, the Court ruled that a parole board's immunity to a wrongful death law suit rationally furthered the state policy of allowing the parole board wide discretion in deciding whether or not to accord parole.

In this case, however, in depriving Mr. Logan of any right to a determination of his discrimination charge, through no fault of his own, the FEPC has acted in a manner which is totally arbitrary and irrational.

The Illinois Supreme Court asserted that it could find two justifications for dismissing a charge because the FEPC inadvertently had failed to convene a fact finding conference within 120 days. In fact, the Illinois Supreme Court's action in dismissing a charge under these circumstances and depriving parties alleging discrimination of their rights serves no legitimate state purpose whatsoever.

The Illinois Supreme Court first suggests that the dismissal promotes the just and expeditions resolution of employment disputes. Such a dismissal, however, cannot be seen to promote a "just" resolution of a dispute, since the dismissal has no connection whatsoever to the merits of the charge,[11/] and is not a

11/ The Illinois Supreme Court also suggests that the dismissal based on the FEPC's failure to comply with time limits serves the purpose of protecting employers from unfounded charges

(Footnote continued on next page)

"resolution" of the charge in any sense other than that in which an arbitrary, baseless death knell may be "expeditious."

This Court has recognized that efficiency itself cannot justify the deprivation, without certain protections, of rights or property protected by the Due Process Clause. In Stanley v. Illinois, 405 U.S. 645, 656-57 (1972), the Court stated:

> [T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the over-bearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

(Footnote 11 continued from previous page)

of discrimination. Appendix to Jurisdictional Statement at 6a. Again, since processing of the charge is terminated with no determination whatsoever with regard to the merits, there is no reason to believe that any charge so dismissed was unfounded. This sort of dispute resolution can be deemed "just" or deemed to "protect employers from unfounded charges," in the same respect that a total bar to the filing of charges could be said to accomplish these purposes.

> Procedure by presumption is always cheaper and easier than individualized determination .

The Court in Mathews v. Eldridge, 424 U.S. 319, 335 (1976), set forth a slightly different measure of the due process requirements which a state must meet before it can deprive a person of property.

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The private interests at stake here, the right to freedom from employment discrimination and to a procedure to vindicate that right, are also the public policy of the State of Illinois, as reflected in its

statutes and constitution.[12] The risk of an erroneous deprivation of this right is enormous; the FEPC reaches no determination on the merits of the terminated discrimination charge and utilizes no procedural safeguards to reduce the likelihood of error when the charge is terminated because of agency delay.

To be weighed against this total deprivation of private and public interests are the state's administrative interests. The court in Eldridge, 424 U.S. at 348, stated:

> Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But...[a]t some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost. (emphasis added)

12/ See Ill. Rev. Stat. ch. 48, §851 (1979). See p. 16, supra.

The parties whose charges have been dismissed as a result of the FEPC's failure to meet a time deadline have not simply been denied "an additional safeguard." While administrative cost factors may serve to limit the number of procedural protections accorded someone affected by government action, such administrative considerations cannot justify what has occurred in this case: the obliteration of rights without any process whatsoever.[13/]

The state's interest in administrative efficiency has been accorded significance by this Court in instances in which state

13/ Thus the state law-accorded property right of employment conditions free from discrimination and of processing of a discrimination charge cannot be eliminated constitutionally by state procedural law.

The situation in this case thus is distinguishable from that described by the plurality opinion in Arnett v. Kennedy, 416 U.S. 134 (1974). In Arnett, a civil service employee's statutory right to be discharged only for cause was limited by a procedural statute which accorded him only post-termination consideration of whether this right had been violated. In this case, the rights to pursue employment free from discrimination and to processing of a discrimination claim were not limited, but rather were nullified completely by procedural rule.

procedural rules do not bar completely any possibility of redress of a party's grievance. In Lindsey v. Normet, 405 U.S. 56 (1972), for example, this court ruled that Oregon did not violate the requirements of due process when it limited the defenses and counterclaims a tenant could assert in summary eviction proceedings. The Court reasoned that these rights were not forever lost to the tenant since he was "not foreclosed from instituting his own action against the landlord and litigating his right to damages or other relief in that action." Id. at 66. This situation is completely different from that of Illinois residents charging handicap discrimination who can lose all state law rights with respect to their charge if the decision below is upheld.

The Illinois Supreme Court's decision thus has created a situation which is comparable to that of parties to litigation

who, through no fault of their own, have failed to comply with discovery requests and as a consequence have had their claims dismissed. This Court has stated that such a dismissal contravenes not only the federal rules governing discovery but the requirements of due process as well. In Societe Internationale Pour Participations Industrielles v. Rogers, 357 U.S. 197, 209 (1958), the Court held that a petitioner's claim could not be dismissed as a sanction for not producing requested documents when the petitioner was unable to secure the documents.

> The provisions of Rule 37 [of the Federal Rules of Civil Procedure] which are here involved must be read in light of the provisions of the Fifth Amendment and that no person shall be deprived of property without due process of law, and more particularly against the opinions of this Court in Hovey v. Elliott, 167 U.S. 409, 42 L. Ed. 215, 17 S.Ct. 841 and Hammond Packing Co. v. Arkansas, 212 U.S. 322, 53 L.ed. 530, 29 S. Ct. 370,

> 15 Ann Cas 645. These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.14/

The Illinois Supreme Court ruling here, based on the FEPC's failure to schedule a timely fact-finding conference,has barred individuals alleging handicap discrimination from any administrative or judicial action whatsoever under Illinois law. They cannot present their unresolved discrimination charge to any other forum. In short, the FEPC has deprived such persons completely of any ability to assert their state constitutional and statutory claimsof employment discrimina-

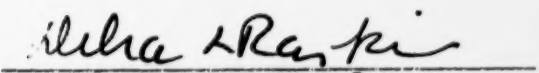
14/ The Court in Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1908) authorized entry of a default judgment against a defendant who failed to produce documents but noted that the defendant had not been punished "for a failure to do that which it may not have been in its power to do." 212 U.S. at 315.

tion. Individuals whose charges have been dismissed due to the FEPC's malfeasance thus are in a situation substantially worse than that of a party charging discrimination who has received an adverse decision from the FEPC; such an individual at least is entitled to seek judicial review of the FEPC's action. Ill. Rev. Stat. ch. 48, §860 (1979). This result constitues arbitrary and irrational governmental action which denies due process of law to individuals whose discrimination charges are dismissed as a result of the FEPC's negligence.

III CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

Respectfully submitted,



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